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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

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RICHARD & DARLENE MATTNER,
d/b/a MATTNER FARMS,

Petitioners,

vs

JESUS BUENO, ET AL.,

Respondents.

Docket No:

* * * * * * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

* * * * * * *

Richard M. VanOrden
Attorney for Petitioners
Business Address:
Ste. 4000 Campau Square Bldg.
180 Monroe NW
Grand Rapids, Michigan 49503
Phone: (616) 776-0278

Date: December 28, 1987

QUESTION PRESENTED

MAY ONE WITHOUT KNOWLEDGE, ACTUAL OR CONSTRUCTIVE, OF THE VERY EXISTENCE OF THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT, AND WHO, AS A CONSEQUENCE THEREOF, FAILS TO COMPLY WITH THE SPECIFICATIONS OF THE ACT BE HELD TO HAVE INTENTIONALLY VIOLATED THE ACT?

PARTIES TO THE PROCEEDINGS

RICHARD MATTNER and DARLENE MATTNER, d/b/a MATTNER FARMS,

Petitioners,

vs.

JESUS BUENO; JOSE CASTRO, JUANA CASTRO; EVANGINA CASTRO; NIEVES CASTRO and LUCILA CASTRO, minors by and through their next friends and parents, JOSE and JUANA CASTRO; LINDA CERNA; ANDRES CERNA; FRANCES DAUGHTRY; ERNESTO CORDOVA; MARTHA CORDOVA; JUANITA CORDOVA; and OLGA CORDOVA, ERNESTO CORDOVA, EULALIO CORDOVA, and ROBERT CORDOVA, minors by and through their next friends and parents, ERNESTO and MARTHA CORDOVA; ELI GONZALEZ, JR.; JESUSITA GONZALEZ; FRANK MARTINEZ; CONSUELO SALINAS; RONALDO BELMAREZ; and NORMA BELMAREZ, minors by and through their next friend and parent, CONSUELO SALINAS; ROSARIO MORENO; RAFAEL MORENO; RAUL JASSO; ARACELIA JASSO; ERMELANDO JASSO; JOSEFINA JASSO; TEODORO JASSO; MARIA LUISA JASSO; SILVIA JASSO; DORA ALICIA JASSO; TEODORO JASSO, JR.; OLGA LYDIA JASSO, minor by and through her next friend and parent, TEODORO JASSO; HERMELINDA JASSO; REYNA JASSO de HERRERA; and SANTOS HERRERA,

Respondents.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDINGS.....	ii
TABLE OF CONTENTS.....	iii
AUTHORITIES.....	iv
OPINIONS BELOW.....	2
JURISDICTION.....	3
STATUTORY PROVISION INVOLVED....	3
STATEMENT OF THE CASE	
A. NATURE OF THE CASE.....	4
B. DISPOSITION BY THE DISTRICT COURT.....	10
C. DISPOSITION BY THE SIXTH CIRCUIT COURT OF APPEAL..	11
REASONS FOR GRANTING THE WRIT	
I. THE SIXTH CIRCUIT'S DEFINITION OF INTENTIONAL CONFLICTS WITH THE DEFINITION OF INTENTIONAL ESTABLISHED BY THIS COURT IN SIMILAR CONTEXT AND CONSTITUTES A FORBIDDEN EXERCISE IN JUDICIAL LEGISLATION.....	14

II. THE DEFINITIONAL STANDARD FOR AN INTENTIONAL VIOLATION AS ACCEPTED AND APPLIED BY THE SIXTH CIRCUIT CONFLICTS WITH THE DEFINITIONAL STANDARD APPLIED IN SIMILAR CONTEXT BY OTHER COURTS OF APPEAL 23

CONCLUSION..... 29

APPENDIX (OPINIONS AND JUDGMENTS BELOW)

A. Final Judgment, United States District Court for the Western District of Michigan, Southern Division (March 27, 1986).....1a

B. Opinion, United States District Court for the Western District of Michigan, Southern Division (March 27, 1986) [Bueno v Mattner, 633 F. Supp. 1446 (W.D. Mich. 1986)]...3a

C. Opinion, United States Court of Appeals for the Sixth Circuit (September 30, 1987) [Bueno v Mattner, 829 F.2d 1380 (6th Cir. 1987)].....91a

D. Judgment, United States Court of Appeals for the Sixth Circuit (September 30, 1987).....121a

AUTHORITIES

Page

Abrams v United States, 250 US 616, 626 (1919)..... 18

Alvarez v Joan of Arc, Inc., 658 F.2d 1217, 1224 (1981)..... 24

Alvarez v Longboy, 697 F.2d 1333, 1338 (1983)..... 24

Bueno v Mattner, 829 F2d 1380, 1385, 1386 (6th Cir 1987)..... 2, 13, 26

Bueno v Mattner, 633 F.Supp. 1446, 1466, 1467 (W.D. Mich 1986)... 2, 10, 11

Castillo v Givens, 704 F.2d 181, 197, 198 (1983).....17, 25

Cramer v United States, 325 US 1, 31 (1944)..... 19

Davis v Williams, 622 F.Supp. 386, 388-389 (1985)..... 24

De La Fuente v Stokely-Van Camp, Inc., 713 F.2d 225, 238-240 (1983).. 24

DeLeon v Ramirez, 465 F.Supp. 698, 701-706 (1979)..... 24

In Re Gurda Farms, Inc., D.C., 15 B.R. 868, 874, 876-878 (1981).... 24

Labor Board v Erie Resistor Corp., 373 US 221, 227, 228 (1962)..... 19

Lorillard v Pons, 434 US 575, 583 (1977)..... 17

N.L.R.B. v Amax Coal Co., 453 US 322, 328-329 (1980)..... 17

Personnel Administrator of Mass. v Feeney, 442 US 256, 278-279 (1978).. 19

Radio Officers v Labor Board, 347 US 17, 45, 46 (1953) (under Evidence Section 167 this is also cited at 74 S Ct 323, 41 ALR2d 621, 98 L Ed 455)..... 19

Rivera v Adams Packing Ass'n, Inc., 707 F.2d 1278, 1283 (1983)..... 24

Russello v United States, 464 US 16, 20-23 (1983)..... 22

Salazar-Calderon v Presidio Valley Farmers Ass'n., 765 F.2d 1334, 1345 (1985).....13, 17, 19, 25

Sandstrom v Montana, 442 US 510, 525-526 (1978)..... 19

Stewart v James, 519 F.Supp. 315, 321 (1981)..... 24

United States v Bishop, 412 US 346, 356, 360-361 (1972)..... 28

U.S. v Illinois Cent. R. Co., 303 US 239, 242-243, 244 (1937)..... 28

STATUTES

7 USC 2041..... 5

28 USC 1254(1)..... 3

29 USC 1801..... 5

29 USC 1803(a)(1)..... 9

29 USC 1821..... 6

29 USC 1821(a)(1)-(5)..... 10

29 USC 1821(c)..... 10

29 USC 1821(d)(1)(2)..... 10

29 USC 1854..... 3

29 USC 1854(a)..... 15

29 USC 1854(c)..... 15

29 USC 1854(c)(1)..... 7

MISCELLANEOUS

48 FR 36736..... 6

H.R. Rep. No. 97-885, 97th Cong. 2d Sess. 1, reprinted in 1982 U.S. Code Cong. & Ad. News 4547, 4567..... 17

IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

RICHARD MATTNER and DARLENE MATTNER
d/b/a MATTNER FARMS,

Petitioners,

vs.

JESUS BUENO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioners Richard and Darlene Mattner, d/b/a Mattner Farms, respectfully pray that a Writ of Certiorari issue to review that part of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 30, 1987, which finds

Petitioners to have "intentionally" violated the provisions of the Migrant and Seasonal Worker Protection Act.

OPINIONS BELOW

The opinion of the Court of Appeals, reported as Bueno v Mattner, 829 F.2d 1380 (6th Cir. 1987), appears in the Appendix hereto along with the separate judgment of that court. The opinion of the District Court for the Western District of Michigan, bearing the same caption, is reported at 633 F.Supp. 1446 (W.D. Mich. 1986), and is also included in the Appendix together with the separate judgment of that court. The district court's opinion was appealed to and affirmed by the Sixth Circuit.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Sixth Circuit were entered on September 30, 1987, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 504 of the Migrant and Seasonal Agriculture Worker Protection Act, 29 USC §1854, provides in relevant part:

> Sec. 504. (a) Any person aggrieved by a violation of this Act or any regulation under this Act by a farm labor contractor, agricultural employer, agricultural association, or other person may file suit in any district court for the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties and without regard to the

exhaustion of any alternative administrative remedies provided herein.

...

(c)(1) If the court finds that the respondent has intentionally violated any provision of this Act or any regulation under this Act, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief, ...

STATEMENT OF THE CASE

A. NATURE OF THE CASE

The Petitioners, Richard and Darlene Mattner, husband and wife, own and operate a family farm in Southwestern Michigan under the name and style of Mattner Farms. Mattner Farms is a multi-crop farming operation. In 1983 the Respondents, thirty-seven in number, were among the one hundred, plus or minus, migrant farm workers

hired by Petitioners in the spring of 1983 to hand harvest strawberries destined for both the fresh and process market. The migrants were paid on a piece-rate basis.

On January 14, 1983, the United States Congress passed the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §1801 et seq., (hereafter sometimes the Act or MSAWPA). The statute became effective April 24, 1983. Interim regulations implementing the Act were published April 12, 1983 [48 FR 36736], and final regulations were published August 23, 1983 [48 FR 38374].

MSAWPA repealed the Farm Labor Contractor Registration Act of 1963, 7 USC § 2041, et seq. Although repealed, the substantive content of the old Farm Labor Contractor Registration Act (FLCRA) was incorporated into the newly

enacted MSAWPA. MSAWPA, however, went beyond the scope of the prior legislation and, for the first time imposed equally upon the agricultural employer and the farm labor contractor many of the notice and disclosure duties previously required only of the farm labor contractor. MSAWPA obligates the agricultural employer, at time of recruitment for employment, to disclose, in writing, to each recruited migrant the specific terms and conditions of the employment, to make certain postings and to keep and to provide certain wage information. 29 USC §1821. Failure to comply with the statutory prescriptions exposes the employer to private civil suit. If the employer is found to have "intentionally violated" the provisions of the Act, the employer becomes liable in damages to each of those aggrieved by

each intentional violation. 29 USC § 1854(c)(1).

The Respondents assert that Mattner Farms failed to comply with the MSAWPA posting and disclosure requirements when the Respondents were recruited during April - June of 1983 to hand harvest the 1983 strawberry crop. These failures, Respondents contend, constitute "intentional" violations of the Act and exposed Petitioners to a private suit for statutory damages.

On February 24, 1983, Respondents commenced suit against Petitioners in the District Court for the Western District of Michigan, alleging violations of both MSAWPA and the Fair Labor Standards Act (FLSA). With respect to their MSAWPA claims, the Respondents alleged violation of the notice and disclosure provisions of the statute. The Respondents also

complained that during the three-week period of the 1983 strawberry harvest, Petitioners had violated the provisions of FLSA by failing to pay the federally prescribed minimum wage and by failing to maintain required employment records. Specifically, the Respondents complained that Mattner Farms failed to keep and record the hours of labor performed by Respondents while picking piece rate during the strawberry harvest.

Additionally, the Respondents alleged that certain of their number had been discriminately discharged from their employment with Mattner Farms in retaliation of their claims of minimum wage violation.

As redress for Petitioners' alleged transgressions, Respondents sought monetary damages, injunctive relief and, with respect to the minimum wage claim, their reasonable attorney fees.

Petitioners answered denying the allegations of the complaint and set forth the family business exemption, 29 USC §1803(a)(1), as an affirmative defense to the MSAWPA claims.

Petitioners acknowledged that they had not complied with the requirements of MSAWPA, contending, however, that this failure was due solely to their lack of any knowledge concerning the Act, even as to its very existence. This lack of knowledge, Petitioners asserted, precluded, as a matter of law, an intentional violation of the Act.

B. DISPOSITION BY THE DISTRICT COURT

With respect to Respondents' MSAWPA claims[1], the District Court held that Petitioners' admitted failure to provide the required disclosures and to make the required postings constituted intentional violations of Sections 1821(a)(1)-(5), 1821(c) and 1821(d)(1)(2) of the Act.[2] Appendix B at p.79; 633 F. Supp 1446, 1466. In finding intentional violations, the District Court ruled: (a) that Petitioners' alleged lack of knowledge

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[1]Regarding Respondents' FLSA claims, the District Court held that as to certain of the Respondents, Petitioners had in fact failed to pay minimum wages in a collective total amount of $611.78; but that no basis existed to support a claim of retaliatory discharge.

[2]No intentional violation was found with respect to Section 1821(b) for failure to post a poster to be provided by the Secretary of Labor since the poster was neither prepared nor available during the 1983 harvest season.

of the existence of the Act, much less of its applicability, did not, as a matter of law, preclude existence of an intentional violation, and (b) that, factually speaking, Petitioners "were aware of the Act's existence and possible application to them in the spring and summer of 1983." Appendix B at p.81; 633 F.Supp. 1446, 1466-1467.

The District Court concluded that each Respondent had been damaged by Petitioners' intentional violations to the extent of $75 per violation or $300 in total amount.

Petitioners appealed the Judgment of the District Court.

C. DISPOSITION BY THE SIXTH CIRCUIT COURT OF APPEALS

With respect to the MSAWPA issue of "intentional violation," the Sixth Circuit found that the District Court's factual finding that Petitioners "were,

or should have been, aware of the Act's existence and possible application to them before the start of the 1983 strawberry harvest" was, when measured against the record, clearly erroneous. Appendix C at p.107; 829 F.2d 1380, 1385. Nonetheless, said the Court, as a matter of law the Petitioners could be held to an intentional violation of the Act even though the Petitioners were "unaware of the existence or applicability of the statute." Appendix C at p.111; 829 F.2d, 1380, 1386.

The Sixth Circuit cited but summarily dismissed the contention of the Petitioners that at least an awareness of the existence of the statute was a prerequisite to liability; that otherwise the term "intentional," as used in the Act, would be without meaning. Instead, the Court pointed to decisions from the Seventh and Ninth

Circuits defining the term "intentional" to mean "conscious or deliberate." The Sixth Circuit noted that the Eleventh Circuit had interpreted "intentional" to mean the standard whereby the natural consequence of one's acts establishes the liability. The Court also noted that the Fifth Circuit had adopted both definitions. Appendix C at p.112; 829 F.2d 1380, 1386.

The Sixth Circuit, after observing that Petitioners did not argue that they "negligently or carelessly" failed to comply with the Act, adopted, as its own, the dicta from Salazar-Calderon v Presidio Valley Farms Ass'n., 765 F.2d 1334 (5th Cir 1985), cert. denied 106 S Ct 1245 (1986) and affirmed the District Court, concluding that although Petitioners' lack of knowledge of the existence of the Act may have caused their failure to comply, their failure

to act was deliberate and thus an intentional violation of the Act.

It is with respect to that portion of the Sixth Circuit's Opinion which finds the existence of an intentional violation of MSAWPA that Petitioners pray issuance of a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT DEFINITION OF INTENT CONFLICTS WITH THE DEFINITION OF INTENT AS ESTABLISHED BY THIS COURT AND CONSTITUTES A FORBIDDEN EXERCISE IN JUDICIAL LEGISLATION.

Petitioners freely acknowledge that during the spring of 1983 when recruiting and hiring a migrant labor force to harvest their strawberries, they did not provide or give the written notices and disclosures required by MSAWPA and, accordingly, were in violation of the Act.

Any person aggrieved by a violation of the Act is granted a private cause of

action. 29 U.S.C. § 1854(a). The statutory grant of a private cause of action is, however, predicated upon the existence of an "intentional" violation of the Act. 29 USC §1854(c).

The Act became effective on April 14, 1983, a point in time only slightly in advance of the time when Petitioners commenced their recruiting and hiring efforts in anticipation of the coming agricultural season. The 1983 strawberry harvest started June 16th and it was during the month of May and the early part of June that the Petitioners hired the migrant labor force to harvest the crop.

Petitioners insist, and the Sixth Circuit has agreed, that at no time prior to the start of the strawberry harvest - and, in fact, at no time during the entirety of 1983 - did Petitioners know of the existence of

MSAWPA or have reason to suspect that such a law was "on the books."

The issue squarely before the Sixth Circuit, therefore, was whether in the context of MSAWPA one can be held to have intentionally violated the Act when one is wholly without knowledge of the Act's very existence.

MSAWPA, itself, provides no internal definitions to assist in determination of whether a violation is to be deemed intentional in character. The legislative history detailing Congressional intent through the report of the House Committee on Education and Labor is of modest help, noting that, as with FLCRA, a private cause of action arises only in the instance of an intentional violation of the statute. See H.R. Rep. No. 97-885, 97th Cong. 2d Sess. 1, reprinted in 1982 U.S. Code Cong. & Ad. News 4547, 4567. It may be

presumed, however, that Congress intended (a) that the word "intentional" would be given its established and well-known meaning at common law or as used in laws of similar character and context, and (b) that the case law dealing with intentional violations under FLCRA would have strong precedential influence on the question of whether a violation of MSAWPA was or was not intentional. Lorillard v Pons, 434 US 575, 583 (1977); NLRB v Amax Coal Co, 453 US 322, 329 (1980).

This Court has not specifically addressed the issue of an intentional violation under either FLCRA or MSAWPA.[3]

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[3]Application for Cert. was denied in the Fifth Circuit cases of Salazar-Calderon v Presidio Valley Farms Ass'n., 765 F2d 1334 (5th Cir 1986), cert denied 106 S Ct 1245 (1986) and Castillo v Givens, 704 F2d 181 (5th Cir 1983), cert denied 464 US 850 (1983). While both of these cases dealt with intentional

The Court has, however, considered and defined the term "intentional" in a number of cases construing statutes of different but similar social character and legislative purpose to FLCRA and MSAWPA. In each instance this Court, either by direct expression or necessary implication, identified the definitional thrust of Congress as aimed at consequence rather than motive when the term intentional was used to characterize a violation. In each case the definitional finding made by the Court reflected and echoed the definition of "intent" set forth by Justice Holmes in his dissent in the early case of Abrams v United States, 250 US 616, 626 (1919), to-wit: that

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violations of FLCRA, in each case, unlike the present situation, the agricultural employer was found to have had knowledge of the statute and to be aware of its existence.

intent means a knowledge of facts, at the time of a voluntary act of commission or omission, from which common experience dictates that consequences might foreseeably follow. See Sandstrom v Montana, 442 US 510, 525-526 (1978); Personnel Administrator of Mass v Feeney, 442 US 256, 278 (1978); Radio Officer v Labor Board, 347 US 17, 45 (1953); Cramer v United States, 325 US 1, 31 (1944); Labor Board v Erie Resistor Corp., 373 US 221, 227 (1962).

In short, the test, the definition, of an intentional act, as established by the numerous decisions of this Court is summarized thusly: one intends the natural consequences which anyone standing in his circumstances and possessing his knowledge would reasonably foresee to result from one's voluntary act of commission or omission.

Essential to the intentional act is volitive conduct and foreseeable consequence, and where there is no volitive conduct, or foreseeable consequence, this Court has not found intentional behavior.

The Sixth Circuit, however, in a detour and frolic, followed the dicta from the Fifth Circuit case of Salazar-Calderon v Presidio Valley Farms Ass'n., 765 F2d 1334 (1985), to the effect that intentional conduct is deliberate conduct, and thus conduct indifferent to a knowledge or lack of knowledge of a foreseeable consequence. See 829 F2d at 1386.

Since any voluntary act must, of necessity, definitionally equate to a deliberate act, every voluntary act that results in a violation of MSAWPA becomes, per se, an intentional violation. Intentional liability is

thus for all intents and purposes equated to strict liability by the Sixth Circuit.

A foreseeable violation of MSAWPA, however, can arise only if one knows or has reason to know that MSAWPA exists. The conflict between the holding below and the several decisions of this Court is, therefore, real, direct and dramatic, and decision of the Sixth Circuit can only be characterized as substantively perpendicular to the relevant holdings of this Court.

The issue before the Court is neither academic nor episodic and if the decision below is allowed to remain, blessed as it were in a left handed way by denial of certiorari, it will effectively restructure and redraft the statutory basis for a private cause of action under MSAWPA and similar legislation, and it will redefine the

common law measure of intentional conduct as applied to so many remedial statutes that prohibit intentional violations or penalize intentional conduct.

When Congress enacted MSAWPA, it provided for criminal sanctions in the event of a willful violation of the statute. It provided a private cause of action in the event of an intentional violation and called for administrative sanctions in the instance of every violation of the statute. By triggering administrative sanctions in the case of every violation - strict liability- but triggering a private cause of action only in the case of an intentional violation, Congress can be presumed to have known and intended a difference between simply the fact of a violation and the existence of an intended violation. Russello v United States,

464 US 16, 23 (1983). The decision below sterilizes - no, rather it emasculates - any distinction between any violation and an intended violation and with a judicial pen it rewrites the statutes as effectively as it rewrites the common law.

The conflict between the Sixth Circuit opinion and the decisions of this Court, and the forbidden exercise of legislative prerogatives, justifies a grant of Certiorari to review the decision below.

II. THE DEINITIONAL STANDARD FOR AN INTENTIONAL VIOLATION AS ACCEPTED AND APPLIED BY THE SIXTH CIRCUIT CONFLICTS WITH THE DEFINITIONAL STANDARD APPLIED IN SIMILAR CONTEXT BY OTHER COURTS OF APPEAL.

The decisions of the Seventh and Ninth Circuits have defined the term "intentional," as used in FLCRA, to mean "conscious or deliberate" and not to

require a specific intent to violate the law. Alvarez v Joan of Arc, Inc., 663 F2d 1217, 1224 (7th Cir 1981); Alvarez v Longboy, 677 F2d 1333, 1338 (9th Cir 1983); De La Fuente v Stokely Van-Camp, Inc., 713 F2d 225, 238 (7th Cir 1983).

In the Eleventh Circuit and the District Courts of New York, however, an intentional violation is equated, as this Court has precedentially instructed, to the common civil standard which holds a person liable for the natural consequences of his or her acts. Rivera v Adams Packing Ass'n., Inc., 707 F2d 1278, 1283 (11th Cir 1983); Stewart v James, 519 F Supp 315, 321 (EDNY 1981); In Re Gurda Farms, Inc., D.C. 15 B.R. 868, 876 (SDNY 1981); Davis v Williams, 622 F Supp 386, 389 (WDNY 1985); De Leon v Ramirez, 465 F Supp, 698, 705 (SDNY 1979).

The Fifth Circuit grasped both definitions and endeavors to treat them as synonymous. Castillo v Givens, 704 F2d 181, 197 (5th Cir 1983); Salazar-Calderon v Presidio Valley Farms Ass'n., 765 F2d 1334, 1345 (5th Cir 1985).

The Fifth Circuit's efforts to the contrary notwithstanding, the two standards are not merely different expressions of the same measure. Where an actor in fact has knowledge of the existence of a statute, the two standards may each lead to a finding of intentional conduct and thereby appear as one and the same route. Their differences remain, however, and they are real and not semantic.

The Sixth Circuit for whatever reason, and without cogent analysis, has chosen to focus on the "deliberate and

conscious" test for defining intentional conducts. See 829 F2d at 1386.

The conflict between the standards applied by the several Circuits can be illustrated by simple example:

> Case #1: A's sister calls and says she will be at the bus station on Sunday. A refuses to pick her up and she waits.
>
> Case #2: A's sister often arrives via bus on Sunday. A does not know whether or not she is coming this Sunday but he guesses she will not and does not go to the station. She arrives and waits.
>
> Case #3: A's sister has never come to visit. She arrives on Sunday unannounced and, needless to say, A is

not at the station. She waits.

In the Eleveth Circuit and in the district courts of New York, no liability would result in case #3 from A's failure to go to the station since the waiting sister was not a natural or foreseeable consequence to his failure. In both cases #1 and #2, however, the consequence of a sister waiting was foreseeable and A's failure to act is deemed intentional.

In the Seventh, Ninth, and now the Sixth Circuit, A's conduct in all three cases would be deemed intentional since in each case his act in not going to the station was, by definition, a deliberate act.

Case #3 equates to the situation of Petitioners. Had Petitioners farmed within the geographic boundries of the Eleventh Circuit, or within the State of

New York, Petitioners would not have been held to an intentional violation of MSAWPA.

The conflict between the Circuits and between the standards applied in determining an intentional violation will, if not resolved by this Court, continue as a source of controversy and confusion. Litigants and the lower courts urgently need the assistance of this Court, specifically, to understand the relevant language of MSAWPA and, generally, to know the construction to be applied in those similar instances of statutory construction that call for the ascertainment of intent. On the occasion of confusion as to the meaning of a "willful" intent, this Court agreed to and did provide constructional guidance. See United States v Bishop, 412 US 346, 360 (1972); U.S. v Illinois Cent. R. Co., 303 US 239, 243 (1937).

Now the need for guidance with respect to what constitutes an "intentional" violation is as acute. The differences between the Circuits cannot be reconciled. It is for this reason that a grant of certiorari is appropriate.

CONCLUSION

For these reasons, a writ of certiorari should issue to review that portion of the judgment and opinion of the Sixth Circuit dealing with and pertaining to the intentional violation of the Migrant and Seasonal Agricultural Worker Protection Act.

Respectfully submitted,

RICHARD M. VAN ORDEN
Attorney for Petitioners
Ste 4000 Campau Sq. Bldg.
180 Monroe Ave., NW
Grand Rapids, MI 49503
(616) 776-0278

DATED: December 29, 1987

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

JESUS BUENO; JOSE CASTRO; JUANA CASTRO; EVANGELINA CASTRO; NIEVES CASTRO and LUCILA CASTRO; minors, by and through their next friend and parents JOSE and JUANA CASTRO; LINDA CERNA; ANDRES CERNA; FRANCES DAUGHTRY; ERNESTO CORDOVA; MARTHA CORDOVA; JUANITA CORDOVA; and OLGA CORDOVA; ERNESTO CORDOVA, EULALIO CORDOVA, and ROBERT CORDOVA, minors, by and through their next friend and parents ERNESTO and MARTHA CORDOVA; ELI GONZALEZ, JR.; JESUSITA GONZALEZ; FRANK MARTINEZ; CONSUELO SALINAS; RONALDO BELMAREZ and NORMA BELMAREZ, minors, by and through their next friend and parent CONSUELO SALINAS; RAFAEL MORENO; ROSARIO MORENO; RAUL JASSO; ARACELIA JASSO; ERMELANDO JASSO; JOSEFINA JASSO; TEODORO JASSO; MARIA LUISA JASSO; SILVIA JASSO; DORA ALICIA JASSO; TEODORO JASSO, JR.; OLGA LYDIA JASSO; minor, by and through her next friend and parent TEODORO JASSO; HERMELINDA JASSO; REYNA JASSO de HERRERA; and SANTOS HERRERA,

Plaintiffs,

vs. File No. K84-63

RICHARD MATTNER and DARLENE MATTNER, d/b/a MATTNER FARMS,

Defendants.
_____/

JUDGMENT

In accordance with the opinion dated March 27, 1986;

IT IS HEREBY ORDERED that Judgement is entered for plaintiffs and against defendants in the amount of $10,823.56, plus attorneys fees and expenses to be determined later;

IT IS FURTHER ORDERED that defendants are enjoined from committing further violations of the Fair Labor Standards Act's minimum wage requirements.

DATED in Kalamazoo, MI:

3/27/86

RICHARD A. ENSLEN
US District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JESUS BUENO; JOSE CASTRO; JUANA CASTRO; EVANGELINA CASTRO; NIEVES CASTRO and LUCILA CASTRO; minors, by and through their next friend and parents JOSE and JUANA CASTRO; LINDA CERNA; ANDRES CERNA; FRANCES DAUGHTRY; ERNESTO CORDOVA; MARTHA CORDOVA; JUANITA CORDOVA; and OLGA CORDOVA, ERNESTO CORDOVA; EULALIO CORDOVA, and ROBERT CORDOVA, minors, by and through their next friend and parents ERNESTO and MARTHA CORDOVA; ELI GONZALEZ, JR.; JESUSITA GONZALEZ; FRANK MARTINEZ; CONSUELO SALINAS; RONALDO BELMAREZ and NORMA BELMAREZ, minors, by and through their next friend and parent CONSUELO SALINAS; ROSARIO MORENO; RAFAEL MORENO; RAUL JASSO; ARACELIA JASSO; ERMELANDO JASSO; JOSEFINA JASSO; TEODORO JASSO; MARIA LUISA JASSO; SILVIA JASSO; DORA ALICIA JASSO; TEODORO JASSO, JR.; OLGA LYDIA JASSO, minor, by and through her next friend and parent TEODORO JASSO; HERMELINDA JASSO; REYNA JASSO de HERRERA; AND SANTOS HERRERA,

Plaintiffs,

vs. File No. K84-63

RICHARD MATTNER and DARLENE MATTNER, d/b/a MATTNER FARMS,

Defendants.

OPINION

This action was filed on February 24, 1984, by a group of thirty-seven (37) migrant farm workers, consisting of twenty-eight (28) adults and nine (9) minors, claiming violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. {{ 201-19, and the Migrant and Seasonal Agricultural Worker Protection Act ("MSAWPA" or the "Act"), 29 U.S.C. {{ 1801-72. The defendants are a husband and wife couple doing business as Mattner Farms, a farming operation located in Eau Claire, Berrien County, Michigan, that they jointly own and operate. The Court tried the case on October 7th, 8th, 9th, 15th, 16th, 23rd, 24th, and 25th. It heard testimony from 21 witnesses and accepted forty-eight (48) exhibits into evidence. The parties completed their post-trial briefing on December 4, 1985. In

accordance with Federal Rule of Civil Procedure 52(a), the following opinion constitutes the Court's findings of fact and conclusions of law in this matter.

Introduction

The parties stipulated to many essential facts. Defendants admit they are covered by the FLSA and that they accordingly were obligated to pay plaintiffs the prevailing minimum wage of $3.35 per hour in 1983. Defendants conduct a multi-crop farming operation and raise, among other crops, strawberries and pickles. They employed migrant laborers -- including nearly all of the plaintiffs -- in 1983 to assist them in cultivating and harvesting their crops. They paid the migrant workers, including plaintiffs, the following piece rate wages during the strawberry and pickle harvests: $1.60 per flat of capped strawberries (with the stem on);

$1.85 per flat of uncapped strawberries (with the stem taken off); and $.90 per pail of pickles. The 1983 strawberry harvest commenced on June 16, 1983, and ended on July 6, 1983. The pickle harvest commenced on July 20, 1983.

Defendants provided rent-free housing for their migrant workers, including nearly all of the plaintiffs, in 1983. They admit they are agricultural employers as that term is defined in the MSAWPA. 29 U.S.C. {{ 1802 (2). They also admit with respect to the Act that they did not fulfill the following requirements: (1) provide in writing the information specified by 29 U.S.C. {{ 1821 (a) (1)-(4); (2) post the poster required by 29 U.S.C. {{ 1821 (b); or (3) provide the itemized written statement specified in 29 U.S.C. {{ 1821 (d) (2). Plaintiffs for their part

admit that the eight minor plaintiffs do not have a cause of action under the FLSA.[1]

The legal and factual issues this case presents arose out of the 1983 strawberry and pickle harvest on defendants' farm. Specifically, plaintiffs allege the following: 1) that defendants failed to comply with the MSAWPA, in part by failing to provide them a) with information concerning the terms and conditions of their employment, and b) with the wage records required by the Act; 2) that defendants did not pay them the minimum wage during the strawberry harvest; and 3) that defendants unlawfully discharged some of the plaintiffs in retaliation for having filed minimum wage complaints. The Court will first discuss plaintiff's FLSA claims, including their claim of retaliatory

treatment. I then will discuss their MSAWPA claims.

Plaintiffs' Minimum Wage Claims

The FLSA required defendants to have paid plaintiffs a minimum wage of $3.35 per hour during the 1983 strawberry harvest. Thus, although defendants paid plaintiffs on a piece rate basis, they had to ensure that plaintiffs' piece rate wage equaled or exceeded the minimum wage. The FLSA also required defendants to have prepared and maintained records documenting, among other things, the hours each plaintiff worked and plaintiffs daily starting and stopping times. 29 C.F.R. {{ 516.2(a)(7) & {{ 516.6(a)(1); see Williams v. Tri-County Growers, Inc., 747 F.2d 121, 127 (3rd Cir. 1984). Although plaintiffs did not sue defendants for having failed to prepare and maintain these records, as

discussed below such failure did expose defendants to liability under the FLSA's minimum wage provisions. See Castillo v. Givens, 704 F.2d 181, 198 n. 41 (5th Cir. 1983), cert. denied, 104 S. Ct. 160 (1984). (The MSAWPA, moreover, contains an analogous requirement that did provide a basis for plaintiffs' suit. 29 U.S.C. {{ 1821 (d)).

The Court's initial concern thus is whether defendants paid plaintiffs the minimum wage during the 1983 strawberry harvest. Before discussing the minimum wage claims of individual plaintiffs, however, I will discuss four legal issues that are generally pertinent to such claims.

The Legal Framework

The first issue concerns the parties' burden of proof. As is normal in a civil case, plaintiffs must establish their entitlement to relief

under the FLSA by a preponderance of the evidence. The Supreme Court, however, recognizing that the FLSA requires the defendant-employer to keep accurate hour and wage records, and that the defendant "is in a position to know and to produce the most probative facts concerning the nature and amount of work performed", has established guidelines for shifting the burden of proof in minimum wage cases. Anderson vs. Mt. Clemens Pottery Co., 328 U.S. 680, 686-88 (1946). This burden-shifting process operates as follows:

> When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable

to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate . . ..

The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept

> records in accordance with the requirements of ((11 (c) of the Act . . . . [W]e are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute . . . . The uncertainty lies only in the amount of damages arising from the statutory violation by the employer . . . . It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages.

Id. at 687-88. Under Anderson, then, the Court must follow three steps in analyzing plaintiffs' minimum wage claims. Initially, it must determine whether defendants have failed to keep accurate or adequate records. If they have failed to keep such records, the Court must decide whether plaintiffs satisfied their burden of producing evidence that a) establishes that they performed work for which they were improperly compensated, and b) allows the Court to determine the amount and

extent of that work as a matter of just and reasonable inference. Plaintiffs' testimony can by itself suffice to satisfy this burden. Williams, 747 F.2d at 128 & n. 13. Finally, provided plaintiffs meet their burden, the Court must determine whether defendants introduced other evidence either establishing the precise amount of work plaintiffs performed or rebutting the inference to be drawn from plaintiffs' evidence.

The second issue concerns whether each plaintiff must testify as to the hours he or she worked. In this case, nine plaintiffs testified on behalf of twenty-eight claimants, although plaintiffs buttressed their claims with affidavits, depositions, and documentary evidence. The Court, of course, prefers live testimony, which allows it to judge the sincerity and credibility of

plaintiffs' claims and allows the parties to fill in the gaps other methods of proof often leave. Courts have consistently held in FLSA cases, however, that some plaintiffs can testify as to the hours other, nontestifying, plaintiffs worked if they have personal knowledge of such hours. Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1331 (5th Cir. 1985); Castillo, 704 F.2d at 195; Donovan v. Kaszycki & Sons Contractors, Inc., 599 F. Supp. 860, 868 (S.D.N.Y. 1984).

In this case, the testifying plaintiffs properly testified as to the hours the nontestifying plaintiffs worked. The testifying plaintiffs stated that the workers generally worked the same hours and that everyone was in the fields together. Defendants did not dispute this testimony, arguing only that some workers may have entered the

fields 15-30 minutes late or have left 15-30 minutes early. Defendants could not, moreover, identify which plaintiffs arrived late or left early. The same holds true for defendants' contention that plaintiffs left the fields at various times to run personal errands, such as applying for food stamps. The Court concludes in light of this testimony that the nine testifying plaintiffs properly established the general number of hours all the plaintiffs worked. As discussed further below, moreover, this testimony established a pattern of FLSA violations by defendants and provided a basis for the Court to determine the amount of wages defendants owe plaintiffs. See id. at 868.

The third issue is whether defendants can include as part of

plaintiffs' wages the reasonable cost to them of providing plaintiffs with lodging. 29 U.S.C. {{ 203(m). I hold they cannot. The Secretary of the Department of Labor has promulgated regulations defining reasonable cost to be "not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees." 29 C.F.R. {{ 531.3(a). The employer bears the burden of showing that he is entitled to the wage credits available under section 203(m). Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 474 (11th Cir. 1982). There is evidence in the record that defendants deducted ten dollars from plaintiffs' weekly wages as payment for housing expenses. There is no evidence, however, supporting defendants' entitlement to this money. The Court therefore disregarded such

deductions in computing plaintiffs' minimum wage claims. Washington v. Miller, 721 F.2d 797, 803 (11th Cir. 1983).

The final issue concerns whether plaintiffs are entitled to injunctive relief under the FLSA. Injunctive relief is available under the FLSA upon a proper showing. Donovan, 599 F. Supp. at 871-72; see 29 U.S.C. (217. I find on the basis of the evidence discussed infra that the Court should grant plaintiffs' request for injunctive relief. Defendants have not shown why such relief would be inappropriate, and the Court believes that an injunction would help to ensure defendants' future compliance with the FLSA's minimum wage and record keeping requirements. The Court may award injunctive relief even if defendants are not presently violating the FLSA. Donovan, 599 F.

Supp. at 872.

The 1983 Strawberry Harvest

The Court now turns to plaintiffs' minimum wage claims. I find initially, in accordance with the procedure established in Anderson, that defendants' work records are inaccurate and inadequate. Section 500.80 of 29 C.F.R., which is part of the MSAWPA, provides that employers must maintain the following records for migrant laborers:

> (a) Each farm labor contractor, agricultural employer and agricultural association which employs any migrant or seasonal agricultural worker shall make and keep the following records with respect to each worker including the name, permanent address, and Social Security number:
>
> (1) The basis on on which wages, are paid;
>
> (2) The number of piecework units earned, if paid on a piecework basis;

(3) The number of hours worked;
(4) The total pay period earnings;
(5) The specific sums withheld and the purpose of each sum withheld; and
(6) The net pay.

29 C.F.R. { 500.80; see also 29 C.F.R. { 516.2 (requirements under the FLSA). Defendants admitted they did not keep such records. They did not, among other things, keep separate wage records for each employee; mark the exact hours of work for each employee; or provide the net pay for each employee.

It is obvious from defendants' testimony, moreover, particularly the testimony of defendant Darlene Mattner, that the hours written on some of the plaintiffs' worksheets were not precise working hours but rather were based on defendants' "observations" of when

particular plaintiffs happened to be in the fields. Defendant Darlene Mattner testified that she recorded these observations on slips of paper, then transferred them to the proper worksheets at the end of the pay period. She was unable to produce the slips of paper at trial, however, and she could not vouch for the complete accuracy of her field notes with regard to individual plaintiffs. Defendant admitted, moreover, that she did not attempt to keep time records for every worker herself but rather sought to have the workers keep track of their own hours on their worksheets. Defendant Darlene Mattner in addition was absent for the final week of the harvest, and her son, Kevin Mattner, kept track of plaintiffs' hours during that time. Kevin Mattner testified that he kept track only of when the first worker

entered and the last worker left the fields, and made no effort to keep track of the hours of individual workers. It thus is apparent that defendants' records for the third week of the strawberry harvest are particularly inaccurate.

In summary, the Court finds that defendants failed to produce accurate and adequate records of the hours plaintiffs worked during the 1983 strawberry harvest. Courts have condemned the kind of record keeping defendants employed as not meeting the FLSA's requirements and I find that it did not do so here. See Williams, 747 F.2d at 127-28; Mendez v. Brady, No. G82-391, slip op. at 7-9 (W.D. Mich. June 6, 1985).

Having decided that defendants' records are unreliable, the Court must now determine whether plaintiffs have

demonstrated that they performed work for which they were improperly compensated. In this case, the evidence concerning this issue overlapped with the evidence concerning the amount and extent of the uncompensated work plaintiffs performed. The Court thus will discuss both issues together. It is sufficient to note for the present that I relied on the following factors in determining that plaintiffs' performed work for which they were not properly compensated: (1) the field records maintained by Kevin Mattner (for the third week of the harvest) and Darlene Mattner are not completely credible as they are only a rough estimation of the hours plaintiffs worked; (2) the shed employees' time records provided the most credible measure of the hours plaintiffs spent in the fields, and in some instances

conflicted with defendants' field records; (3) there was rather uniform testimony that plaintiffs' commenced working at approximately seven o'clock (7:00) each morning; and (4) plaintiffs consistently testified that they worked in the afternoons, and defendants were unable to rebut such testimony completely.

In the absence of accurate time records, the Court found it difficult to determine how many hours plaintiffs worked. Some courts have determined the number of hours of work in this kind of case by deciding how many units an average worker can pick in one hour, then dividing that number into the total number of units picked. E.g., Mendez, No. G82-391, slip op. at 17-18 (W.D. Mich. June 6, 1985). In this case, however, neither party presented

credible testimony from which the Court could determine how many carriers of berries an average worker can pick in one hour. The Court thus employed the following approach to determine how many hours plaintiffs worked.

First, I determined the maximum number of hours any one plaintiff could have worked in a particular pay period, and consequently the wage defendants would have had to pay such plaintiff to satisfy the minimum wage requirement. I then determined the number of hours each adult plaintiff worked and the wage he or she was paid for each week of the three-week 1983 strawberry harvest. This approach shows that most of the plaintiffs performed work during the 1983 strawberry harvest for which they were not properly compensated, and produces a just and reasonable measure of the amount and extent of such

uncompensated work. Defendants, moreover, were unable to produce evidence either establishing the precise amount of work plaintiffs' performed or rebutting the inferences to be drawn from plaintiffs' evidence.

The first week of the harvest ran from June 16th through June 22nd. Plaintiffs worked a maximum of 29 hours during this week, and should have received at least $97.15 in wages for such hours of work. The Court credited testimony indicated that plaintiffs worked only 1-3 hours the first two days of the harvest, and did not work at all on Saturday, the 18th. For the balance of this first week, the Court relied primarily on the hours of the shed employees in determining the number of hours plaintiffs worked. I did not credit defendants' field records of

plaintiffs' hours for two reasons: (1) the shed employees' time records showed that plaintiffs worked during periods for which defendants' field records indicate they did not work; and (2) defendants' field records were inconsistent with Kevin Mattner's testimony indicating that plaintiffs did not pick at all in the afternoons the first week.

With regard to the second work week, which lasted from June 23rd to June 29th, the Court finds that plaintiffs worked a maximum of 38.25 hours and should have been paid at least $128.14 for such work. I did not credit plaintiffs with any hours of work on Saturday, the 25th, for the following reasons: (1) Kevin Mattner, Richard Mattner, and Darlene Mattner testified that plaintiffs did not work on Saturdays; (2) Martin Bass testified

that the fresh market for strawberries was not open on Saturdays; and (3) only two packing shed workers, Kay Love and Larry Schultz, recorded hours for that day whereas the testimony indicated that more than two persons generally worked in the shed during the fresh market season.

For the final week of the harvest, the Court finds that plaintiffs again worked a maximum of 38.25 hours, for a total minimum wage of $128.14. The Court credited defendants with a rain delay on July 1st and credited plaintiffs with work on the afternoon of the July 4th. Although defendants' climatological records show that it rained on the 4th, the records do not show when the rain occurred, and shed employee time records indicate defendants probably harvested process market berries that day.

Individual Plaintiffs' Claims

With these general legal standards and factual guidelines in mind, the Court will now address the claims of the individual plaintiffs. I note initially that certain plaintiffs failed to introduce any evidence, oral or written, evincing either that they worked for defendants during the 1983 strawberry harvest, or, if they did work for defendants, the amount of such work. The Court accordingly cannot credit such plaintiffs with any hours worked and must deny their claims on the ground that they failed to meet their initial burden of proof under Anderson. The Court's findings with regard to plaintiffs' individual claims are as follows:

Jesus Bueno. Mr. Bueno received wages of $126.61 and $137.30 for the first and second weeks of the harvest,

respectively. Thus, even given that he worked the maximum number of hours both weeks, he has no minimum wage claim for the first two weeks of the harvest. Mr. Bueno does, however, have a minimum wage claim of $36.76 for the third week of the harvest. The Court finds that plaintiff worked 30 hours that week but received only $63.74 in wages. I did not credit Mr. Bueno with a full work week of 38.25 hours because his rate of picking, had I done so, would have been less than one carrier per hour.

The Court, however, also cannot credit defendants' claim that Mr. Bueno worked only 18 hours that week. First, defendants have no accurate records to support that claim. The record they produced at trial was based solely on Kevin Mattner's rough estimation of Mr. Bueno's hours and they could not produce the notes on which Kevin Mattner

allegedly recorded such hours. Given the number of carriers Mr. Bueno picked that week, moreover, his rate of picking based on 30 hours of work would have been about one and one-half (1-1/2) carriers per hour, which accords well with testimony concerning the average speed of workers picking process market berries at the end of the season. Third, I must give plaintiff the benefit of the doubt due him under Anderson as defendants have failed to produce accurate work records. Finally, I cannot believe that with 80-110 workers in the field, defendants were able, using only rough notes, to keep track of Mr. Bueno's hours with the kind of precision they claim.

Jose Castro, Juana Castro, and Evangelina Castro. The Castros' worksheets indicate they all made the

minimum wage during the first two weeks of the harvest. Their records for the third week of the harvest, however, reveal minimum wage violations. Specifically, Jose Castro can claim a violation of $26.85; Juana Castro can claim a violation of $35.85; and Evangelina Castro can claim a violation of $35.85. The Court credited each of these plaintiffs with 32 hours of work for the third week of the harvest. I based this determination on the following factors: 1) the Castros testified they all worked together, so their work times would have been the same; 2) the Castros picking speed based on 32 hours of work would have been between one to three carriers per hour, which accords with trial testimony concerning picking speeds; 3) the Court, for the reasons discussed with respect to Mr. Bueno's claim, cannot totally

credit defendants' claims regarding the Castros' work hours; 4) although plaintiffs' rate of picking for this week was slower than their rate for the first two weeks of the harvest, the relative scarcity of the berries during the third week and the fact that the workers were picking primarily process market rather than fresh market berries adequately accounts for the slower speed; and 5) the Court reduced plaintiffs' hours some to reflect the contributions of Lucila Castro.

Linda Cerna and Francis Daughtry. The Court finds that Linda Cerna made the minimum wage for the first two weeks of the harvest, but can claim a minimum wage violation of $19.26 for the third week. Although Linda Cerna's worksheets indicate a minimum wage violation for the first week, testimony at trial

established that she did not begin work until June 19. She thus can claim a maximum of 25 hours of work for the first week, making her pay for that week sufficient to meet the minimum wage. With regard to the third week, the Court finds that Linda Cerna worked on June 30th, but was not paid for such work. Richard Mattner's testimony indicated that Ms. Cerna was fired as of June 30, and that she was working on the day she was fired. This finding corresponds, moreover, with the trial testimony of Linda Cerna and the deposition testimony of Thomas Kearny.

The Court finds that Francis Daughtry did not work for defendants during the 1983 strawberry harvest. I discuss these two plaintiffs together because my finding that Linda Cerna made the minimum wage the first two weeks of the harvest depends on my finding that

Francis Daughtry did not work for defendants during the harvest. If Francis Daughtry did work for defendants, then the Court would have to credit Ms. Cerna with only one-half (1/2) of the wage listed on the worksheets, which could reveal some minimum wage violations. There was conflicting testimonial and other evidence concerning whether Francis Daughtry worked for defendants. Martha Cordova testified that Ms. Daughtry lived and worked on defendants' farm, and that Ms. Cerna's daughter also worked in the fields. [The Court did not credit Ms. Cerna's daughter with any time or wages because there was insufficient evidence regarding how much work she performed.] Mr. Garcia testified, however, that there was only one white woman working in the fields that summer during the strawberry

harvest, and Kevin Mattner testified that he did not remember seeing Francis Daughtry or Ms. Cerna's daughter working in the fields. Mr. Kearney's deposition testimony regarding Ms. Cerna's firing and defendant Richard Mattner's statements at that time concerning Ms. Daughtry is probative but not conclusive on the issue. Mr. Kearney did not testify at trial and his deposition testimony is sketchy. What the Court found determinative, however, was the absence of any testimony from Ms. Daughtry -- either in person or through deposition -- indicating that she worked for defendants during the 1983 strawberry harvest. I thus find the plaintiffs have failed to carry their burden of proof on this issue.

Andres Cerna. Andres Cerna's worksheets indicate he made the minimum wage throughout the 1983 strawberry

harvest. The Court thus denies his claims.

Ernesto Cordova, Martha Cordova, and Juanita Cordova. The Cordovas' worksheets indicate minimum wage violations of $13.74 for each plaintiff during the first week of the harvest; no minimum wage violations during the second week; and minimum wage violations of $52.02 for each plaintiff during the third week. The decisive issue regarding the Cordova family's claim was how many persons each worksheet included. Defendants testified that each worksheet included five persons. Ernesto Cordova testified that there were seven persons on each worksheet: himself, his wife, and his five children. The June 24th worksheet lists five persons: Ernesto, on the front, and Ernesto, Jr., Olga, Eulalio,

and Juana, on the back. Martha Cordova testified, moreover, that she also worked in the fields. The Court thus credits these plaintiffs with six persons per worksheet, revealing the minimum wage violations cited above. The Court does not credit the youngest child, Robert, with any work for two reasons: (1) there was no specific testimony that he worked in the fields and he was not listed on the June 24th worksheet; and (2) since he was only 12 years of age in 1983, he probably did not contribute significantly to the family's production even if he did work. Testimony at trial indicated that the younger children helped primarily to fill their parents' baskets and to carry the baskets to the packing shed.

Eli and Jesusita Gonzalez. The worksheets of these two plaintiffs reveal no minimum wage violations.

Neither of them testified at trial and they introduced only their worksheets and the testimony of others in behalf of their claims. They apparently intended to combine their output and wages on one worksheet. The worksheets for the first two weeks of the harvest clearly reveal that they did combine their output and wages and that they suffered no minimum wage violations for such weeks. The worksheet for the first week of the harvest indicates there may have been a minimum wage violation if the sheet included both plaintiffs. There is no evidence, however, demonstrating that the worksheet did include the output and wages of both plaintiffs. The June 24th worksheet listed both plaintiffs and there was a two (2) with a circle around it and hours for two persons on the July 1st worksheet. The July 8th worksheet, however, lists only Eli Gonzalez and

there is no indication that Jesusita Gonzalez was included on that worksheet. Plaintiff Jesusita Gonzalez thus did not meet her burden of proving that she worked during the third week of the harvest. The Court rejects her contention that it should assume she was included on the July 8th worksheet because she was included on the other worksheets and because it was a common practice to put a husband and wife on one worksheet.

Consuelo Salinas. Testimony at trial indicated that Consuelo Salinas picked in conjunction with her daughter, Norma. The Court thus divided the wages Ms. Salinas received in half to determine whether she was paid the minimum wage. Ms. Salinas' worksheets for the first two weeks of the harvest indicate that she did not suffer any

minimum wage violations. The problem is with the third week of the harvest, for which Ms. Salinas produced no worksheet. Ms. Salinas testified at a deposition that she had worked during the third week of the harvest. Defendant Darlene Mattner testified to the contrary at trial, stating that Ms. Salinas was in the advanced stages of a pregnancy at that time and hence did not work in the fields. The Court finds that although it is a close question, the absence of a worksheet for the third week of the harvest precludes it from ruling in plaintiff Salinas' favor. It is impossible for me to make a firm credibility judgment from the lifeless pages of Ms. Salinas' deposition transcript, and she introduced no other evidence to corroborate her deposition testimony. The Court thus finds that she has not met her burden of proof on

this issue.

Frank Martinez. Mr. Martinez' worksheets reveal no minimum wage violations. The only question with regard to his claim involves the third week of the harvest, when Mr. Martinez made $203.33. If the Court were to divide such sum in half to account for the alleged work of the plaintiff's son, then Mr. Martinez would have a minimum wage claim for the third week. Defendant Darlene Mattner testified at trial that plaintiff's son worked for part of the third week, but stated that he did not work the entire week. Plaintiff did not testify at trial. Although the Court, as explained above, does not credit Ms. Mattner's testimony completely, I find that plaintiff has not met his burden of proof under Anderson of demonstrating how much his

son worked, at least as a matter of fair and reasonable inference, during the third week of the harvest.

Rosario Moreno and Rafael Moreno. The Court finds that each of these plaintiffs suffered a minimum wage violation of $7.29 for the third week of the harvest. The Court divided plaintiffs' wages in two since they picked together. Their worksheets reveal no violations for the first two weeks of the harvest. Their worksheet for the third week reveals the violation stated above. The Court credited these plaintiffs with a full week of work for the third week.

Raul Jasso and Aracelia Jasso. The Court will discuss these two plaintiffs together because they claim they picked together, combined their outputs, and divided equally the wages they received.

The Court notes initially that Raul and Aracelia Jasso, like the other members of the Jasso family, did not testify at trial or produce any deposition testimony on their behalf. The Court thus must adjudicate their minimum wage claims based on the work records submitted in their behalf and other plaintiffs' testimony.

The Court must deny Aracelia Jasso's claim because she did not meet her burden under Anderson of proving that she performed uncompensated work, or any work for that matter, for defendants. Plaintiff's name is listed on various food stamp records, but not on any worksheets, and there is no additional evidence other than the assertions of her attorneys that she worked for defendants during the 1983 strawberry harvest. It is a close question whether Ms. Jasso worked for

defendants because she is listed on a worksheet dated July 22nd, and testimony at trial indicated that not all of the workers were listed on the worksheets submitted in their behalf. The Court must conclude, however, that plaintiff has not proven her claim. The Court must also deny Raul Jasso's claim because it is clear that he made the minimum wage for each week of the harvest if Aracelia Jasso is not included on his worksheets.

Ermelando Jasso and Josefina Jasso. The Court will discuss the claims of these two plaintiffs together because they submitted a joint worksheet for the third week of the season. Ermelando Jasso's worksheets for the first two weeks of the harvest (Joint Ex. V) reveal no minimum wage violations. Similarly, Josefina Jasso's worksheets for the first two weeks of the harvest

(Joint Ex. W) also reveal no minimum wage violations. Plaintiffs' joint worksheet for the third week of the harvest (Joint Ex. V), however, reveals a minimum wage violation of $44.45 for each plaintiff. The Court credited each plaintiff with a full 38.25 hours of work for this week. Their picking speed given a full week of work would have been a little over one carrier per hour, which is within the range of picking speeds testified to at trial. The Court, moreover, cannot credit the testimony of Darlene Mattner and Adan Benavides regarding the work the Jasso "girls" performed, or did not perform, during this week. They did not differentiate among the "girls" with regard to when or how long they may have worked. The Court finds it slightly incredible, moreover, that Darlene

Mattner could have determined that each member of the Jasso family worked 27 hours during the third week of harvest when she stated that they missed different days and even different hours within a day. Finally, Adan Benavides testified only that he occasionally had to get the "girls" from the camp in the afternoon, not that they did not work in the afternoon.

Teodoro Jasso, Maria Luisa Jasso, Silvia Jasso, Dora Alicia Jasso, and Teodoro Jasso, Jr. The Court will consider the claims of these plaintiffs together because their output and pay were listed on one worksheet. Darlene Mattner testified that each worksheet included six persons, so the Court divided the wage listed on the worksheets by six to determine the wage each plaintiff received. For the

reasons discussed above with respect to plaintiffs Ermelando Jasso and Josefina Jasso, moreover, the Court credited each of these plaintiffs with a full 38.25 hours of work for the last week of the harvest.

Following these guidelines, the Court finds that each of these plaintiff earned the minimum wage for the first two weeks of the harvest. Each one can claim a minimum wage violation of $31.29, however, for the third week of the harvest.

Hermelinda Jasso. The Court must deny this plaintiff's claim because she introduced no evidence regarding the work she allegedly performed during the 1983 strawberry harvest. Plaintiff claims Joint Exhibit V are her 1983 worksheets. Those sheets, however, bear the name of Ermelando Jasso, not Hermelinda Jasso. If they were

Hermelinda's worksheets, moreover, than Ermelando's claim must fail due to lack of support.

Reyna Jasso de Herrera and Santos Herrera. The Court finds that these plaintiffs did not work for defendants during the 1983 strawberry harvest and thus will deny their claims. It is sufficient to state as a rationale for this decision that they produced no credible evidence to support their claims.

Liquidated Damages

Having found that defendants did not pay certain plaintiffs the minimum wage during the 1983 strawberry harvest, the Court must now determine whether such plaintiffs can recover an additional sum equal to the amount of their unpaid minimum wages as liquidated damages. Section 216(b) of the FLSA states in part as follows:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

29 U.S.C. {{ 216 (b). Section 260 of the same title, however provides:

> In any action commenced...to recover unpaid minimum wages...or liquidated damages, under the Fair Labor Standards Act of 1938..., if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938...the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

29 U.S.C. {{ 260. The Sixth Circuit has interpreted this section as follows:

> For the court's discretion to be invoked, however, the

> delinquent employer must sustain a "plain and substantial burden of persuading the court by proof that his failure to obey the statue was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict." Rothman v. Publisher Industries, Inc., 201 F.2d 618, 620 (3d Cir. 1953)....In the absence of such proof a District Court has no power or discretion to reduce an employer's liability for the equivalent of double unpaid wages.

McClanahan v. Mathews, 440 F.2d 320, 322 (6th Cir. 1971) (citations omitted); see Williams, 747 F.2d at 129 (the employer must produce "plain and substantial evidence to satisfy the good faith and reasonableness requirements").

I find that defendants here did not meet their plain and substantial burden of demonstrating that they acted both in good faith and on reasonable grounds. This test incorporates both a subjective and an objective standard. Id. The

Court finds that defendants subjectively did not act in good faith. They were aware, as defendant Darlene Mattner admitted, of their obligation to pay plaintiffs the minimum wage and, more importantly, to keep track of the number of hours each plaintiff worked. They failed to meet those obligations. Darlene Mattner testified that she attempted to have the workers keep track of their own hours. Defendant must have been aware from her prior experience with migrant workers, however, that such a system would fail. At the very least, she knew by the second week of the harvest that the system would not work, yet failed to implement an alternative system.

Defendants' apparent effort to keep track of the number of hours each worker spent in the fields through the use of notes was equally ineffective. Many

workers, moreover, have no separate records of their output, hours, or wages. Without these kinds of records, the Court fails to see how defendants can claim they attempted in good faith to comply with the FLSA's requirements. For these same reasons, the Court also finds that defendants failure to obey the statue was not predicated on reasonable grounds. The Court sympathizes with defendants difficult task of keeping track of the hours and wages of 80-110 migrant workers. That nevertheless is their legal obligation and they clearly did not take reasonable steps during the 1983 strawberry harvest to comply with the law. The Court therefore will award the appropriate plaintiffs liquidated damages as provided for in section 216(b). I will also note that I reject defendants' argument that plaintiffs claims are de

minimis. Compare Hill v. United States, 751 F.2d 810, 814-15 (6th Cir. 1984) (infrequent and minimal interruptions during lunch period are subject to de minimis doctrine), cert. denied, 106 S. Ct. 63 (1985); Lindow v. United States, 738 F.2d 1057, 1062-64 (9th Cir. 1984) (daily periods of approximately ten minutes found to be de minimis). The Court, moreover, will grant plaintiffs' request for injunctive relief and will enjoin defendants from committing future violations of the FLSA's minimum wage requirements.

Plaintiffs' Retaliation Claim

Plaintiffs brought claims of retaliatory discharge under the FLSA on behalf of the Castro family, the Jasso family, and the Gonzalez family. See 29 U.S.C. (215(a)(3). Plaintiffs, for good reason, barely discussed these claims in their post-trial briefs,

devoting only one paragraph to them. The record is simply devoid of any credible evidence that defendants fired these plaintiffs on or about July 25, 1983, in retaliation for such plaintiffs having filed minimum wage complaints against them. The Court therefore will deny these plaintiffs' claims of retaliatory discharge.

Plaintiffs' MSAWPA Claims

Plaintiffs predicate their second ground for relief on the Migrant and Seasonal Agricultural Worker Protection Act.[2] Congress enacted this statute, which evolved out of the Farm Labor Contractor Registration Act of 1963 ("FLCRA"), in an effort to strengthen FLCRA's protections for migrant farm workers. H.R. Rep. No. 97-885, 97th Cong., 2d Sess. 1, reprinted in 1982 U.S. Code Cong. & Ad. News 4547, 4547-50. The portions of the Act that relate

to this case require agricultural employers to comply with certain informational and recordkeeping requirements and to ensure the safety and sanitation of migrant housing. 29 U.S.C. {{ 1821 & 1823.

Defendants admit that they did not comply with the following provisions of the Act: (1) sections 1821(a)(1)-(4); (2) section 1821(b); and (3) section 1821(d)(2). The parties contest defendants' compliance with the Act's other provisions. Defendants argue, moreover, that they fall within the Act's family business exemption and thus need not comply at all with the Act's requirements. They also argue that even if the Court finds that they are not covered by this exemption and thus have violated the Act, it should not assess any damages against them because such violations were not intentional.

The Court will divide its discussion of plaintiff's claims under the Act into three areas: (1) whether defendants fall within the family business exemption; (2) if they do not, what provisions of the Act did defendants violate; and (3) were such violations intentional. I note initially that because the Act is a remedial statute designed to protect migrant workers, I must construe its provisions broadly so as to effectuate Congress' remedial intent. Soliz v. Plunkett, 615 F.2d 272, 275-76 (5th Cir. 1980) (decision under the FLCRA); Marshall v. Coastal Growers Association, 598 F.2d 521, 525 (9th Cir. 1979) (FLCRA decision). The Court correspondingly will construe narrowly exemptions available under the Act. See Luther v. Z. Wilson, Inc., 528 F. Supp. 1166, 1171

(S.D. Ohio 1981) (decision under the FLSA).

Family Business Exemption

Section 1803(a)(1) exempts the following group of persons from the Act's requirements:

> (1) Family business exemption.--Any individual who engages in a farm labor contracting activity on behalf of a farm...which is owned or operated exclusively by such individual or an immediate family member of such individual, if such activities are performed only for such operation and exclusively by such individual or an immediate family member....

29 U.S.C. §1803(a)(1). The Act's legislative history clarifies that a business or farm can claim the benefit of this exemption only if any farm labor contracting activity performed for such business or farm "is performed exclusively by [an] immediate family member[]...." H.R. Rep. 97-885 at 10, reprinted in 1982 U.S. Code Cong. & Ad.

News at 4556. Section 1802(6) defines a "farm labor contracting activity" as the act of "recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker." 29 U.S.C. (1802(6). I note that this definition is in the disjunctive: any one of these activities would constitute a farm labor contracting activity.

After careful consideration of all the evidence, the Court finds that defendants cannot claim the benefit of this exemption. I conclude that the evidence demonstrates that persons other than defendants or their immediate family members performed farm labor contracting activities on defendants' behalf. I do not reach this conclusion without some doubt. I believe, however, that a contrary result would eviscerate the protections available under the Act;

I further believe that a preponderance of the evidence supports my finding that defendants are not entitled to the exemption.

The Court reaches this conclusion for two reasons. First, it finds that Adan Benavides performed farm labor contracting activities on defendants' behalf. The evidence shows that defendants implicitly or explicitly authorized Mr. Benavides to bring workers with him to their farm and that Mr. Benavides was at least partially in charge of his "crew". I find that Mr. Benavides' activities were not, as defendants argue, merely a "frolic" or "detour" on his part, but were performed pursuant to defendants' authorization, or at least with defendants' knowledge and acquiescence. I am convinced from listening to Mr. Benavides' testimony at trial and from reading this deposition

that defendants gave him the impression that he would have seven houses to fill at the camp, and that Mr. Benavides accordingly brought workers with him from Florida to fill such houses. The Court relied on the following in reaching these conclusions:

1. The Court did not find defendant Darlene Mattner's attempts to disassociate defendants from Mr. Benavides' activities to be credible. I find it difficult to believe that defendants, as they claim, did not have an employment contract with Mr. Benavides prior to his arrival at their farm. The Court finds, moreover, that at some point during their telephone conversations with Mr. Benavides during the spring of 1983, defendants authorized Mr. Benavides to bring workers with him to their farm. Testimony indicating that Mr. Benavides

supervised or dealt with particular workers further supports this findings.

2. The following plaintiffs testified that Mr. Benavides brought workers with him from Florida or otherwise performed activities inconsistent with defendants' contention that he acted merely as a "field supervisor": Jose Castro testified that Mr. Benavides was his supervisor and had brought persons with him from Florida; Andres Cerna testified that Mr. Benavides showed his family to their housing; Ernesto Cordova testified that Mr. Benavides hired his family and showed them to their housing (the Court credits plaintiffs' testimony regarding the Cordova incident); Martha Cordova corroborated Ernesto Cordova's testimony; Auturo Garcia, one of defendants' witnesses, testified that Mr. Benavides brought three or four

families with him from Florida; Rafael Moreno testified that Mr. Benavides brought him to the Mattners; and Jesus Bueno testified that Mr. Benavides brought him to the Mattners and paid him his weekly wages.

3. Adan Benavides testified at trial and at his deposition that defendants authorized him to fill seven houses. The Court does not find Mr. Benavides' testimony to be completely credible, but it is sufficiently supported by other testimony that I cannot discredit it completely.

4. Defendant Darlene Mattner testified that defendants accepted the Moreno family as workers knowing that Adan Benavides had recruited them. The Court does not believe that the fact that Mr. Moreno is Mr. Benavides' brother-in-law means that Mr. Benavides

did not perform a farm labor contracting activity for defendants.

Defendants cannot claim the benefit of the family business exemption, and thus escape liability under the Act, by arguing that they never explicitly authorized others to perform farm labor contracting activities on their behalf when they accepted the benefit of migrant labor brought to their farm through the efforts of other workers. Defendants' acceptance of some workers with the knowledge that they were there because of Mr. Benavides' efforts precludes them from claiming the benefit of this exemption.

The Court also finds that other workers in addition to Mr. Benavides performed farm labor contracting activities on defendants' behalf. Other migrant workers recruited or solicited many of the migrants who worked on

defendants' farm during the 1983 strawberry harvest. Defendants were aware, moreover, of this recruitment and solicitation. Defendant Darlene Mattner testified that defendants would hire new workers who would arrive with repeat help, and Mr. Cerna testified that a friend of his had told him about the Mattners. The Court therefore finds that defendants at least tacitly allowed others to perform farm labor contracting activities on their behalf, and thus do not fall within the family business exemption.

Defendants' Violations

The next question the Court must consider is whether defendants violated any of the Act's provisions. The following provisions relate to this issue:

> § 1821(a) Each farm labor contractor, agricultural employer, and agricultural

association which recruits any migrant agricultural worker shall ascertain and disclose in writing to each such worker who is recruited for employment the following information at the time of the workers' recruitment:

(1) the place of employment;

(2) the wage rates to be paid;

(3) the crops and kinds of activities on which the worker may be employed;

(4) the period of employment;

(5) the transportation, housing, and any other employee benefit to be provided, if any, and any costs to be charged for each of them;

(6) the existence of any strike or other concerted work stoppage, slowdown, or interruption of operations by employees at the place of employment; and

(7) the existence of any arrangements with any owner or agent of any establishment in the area of employment under which the farm labor contractor, the agricultural employer, or the agricultural

association is to receive a commission or any other benefit resulting from any sales by such establishment to the workers.

(b) Each farm labor contractor, agricultural employer, and agricultural association which employs any migrant agricultural worker shall, at the place of employment, post in a conspicuous place a poster provided by the Secretary setting forth the rights and protections afforded such workers under this chapter, including the right of a migrant agricultural worker to have, upon request, a written statement provided by the farm labor contractor, agricultural employer, or agricultural association, of the information described in subsection (a) of this section. Such employer shall provide upon request, a written statement of the information described in subsection (a) of this section.

(c) Each farm labor contractor, agricultural employer, and agricultural association which provides housing for any migrant agricultural worker shall post in a conspicuous place or present to such worker a statement of the terms and

conditions, if any, of occupancy of such housing.

(d) Each farm labor contractor, agricultural employer, and agricultural association which employs any migrant agricultural worker shall --

(1) with respect to each such worker, make, keep, and preserve records for three years of the following information:

(A) the basis on which wages are paid;

(B) the number of piecework units earned, if paid on a piece-work basis;

(C) the number of hours worked;

(D) the total pay period earnings;

(E) the specific sums withheld and the purpose of each sum withheld; and

(F) the net pay; and

(2) provide to each worker for each pay period, an itemized written statement of the information required by paragraph (1) of this subsection.

18 U.S.C. {{ 1821(a)-(d). Defendants admit that they violated sections 1821(a)(1)-(4), 1821(b), and 1821(d)(2). With respect to section 1821(b), however, defendants argue that the Court should excuse their violation of this section because the Secretary had not provided the requisite poster for them to use during the summer of 1983. Defendants also contend, moreover, that they did not violate sections 1821(c) and 1821(d)(1).

The Court finds that defendants admission of having violated sections 1821(a)(1)-(4) of the Act is well-founded. The evidence demonstrates that defendants did not provide the written disclosures that section requires. I also find, moreover, that defendants--with regard to the disclosure of housing costs -- violated subsection 1821(a)(5) as well as the previous four

subsections. Defendants apparently argue with regard to this subsection that they provided the requisite disclosure on the food stamp forms they filled out for plaintiffs. Defendants make this same argument with regard to their alleged violation of section 1821(c).

The Court must reject this argument for two reasons. First, with respect to section 1821(a)(5), even if such records could constitute the requisite written disclosure, the food stamp records defendants introduced at trial do not indicate that plaintiffs received such information at the time of recruitment, as the section requires. Second, with respect to both section 1821(a)(5) and section 1821(c), defendants' documentary evidence does not indicate that each worker received written notice of the terms and conditions of the housing. I

thus find that defendants failed to comply with subsection 1821(a)(5) as well as subsections 1821(a)(1)-(4).

Section 1821(a), however, protects only those workers who defendants recruited for employment. Defendants presented no argument concerning the recruitment requirement. Plaintiffs stated in their post-trial brief that defendants recruited plaintiffs Jose Castro, Juana Castro, Evangelina Castro, Nieves Castro, Lucila Castro, Eli Gonzalez, Jesusita Gonzalez, Frank Martinez, Consuleo Salinas, Ronald Belmarez, and Norma Belmarez. The Court finds that the evidence supports plaintiffs' argument. It also finds that defendants recruited -- as that term is used in the Act -- most, if not all, of the plaintiffs for the 1983 strawberry harvest.

The Act's legislative history indicates that the term "recruits" encompasses activities that "run[] the spectrum from the actual pre-employment discussions between the recruiter and the migrant worker to the filing of job orders with the interstate recruitment system established by the Wagner-Peyser Act." H.R. Rep. No. 97-885 at 13, reprinted in 1982 U.S. Code Cong. & Ad. News at 4559. Recruit is defined in part, moreover, as "to secure the services of...." Webster's New Collegiate Dictionary 959 (1979).

Inasmuch as defendants argue that they personally talked to every plaintiff before "securing their services", the Court concludes that they "recruited" such persons and thus were required to disclose the information listed in section 1821(a). The Court thus finds that most, if not all, of the

plaintiffs can claim a violation of section 1821(a). As discussed below, moreover, I do not believe that such violations were mere technical violations of the Act's requirements. A potential employee needs information concerning the terms and conditions of employment to make an informed judgment concerning the desirability of the employment opportunity.

Plaintiffs next allege that defendants failed to post the poster specified in section 1821(b). Defendants admit they failed to comply with section 1821(b), but argue that the Court should excuse such failure because the required poster was not available during the 1983 strawberry harvest. The Court finds that defendants' argument is well-founded. Plaintiffs introduced no evidence that the poster was available during the 1983 harvest, and the Court

concludes from defendants' evidence that it was not available at that time. The final regulation specifying the form for such poster was not published, for example, until August 23, 1983. The Court thus believes that defendants did not violate section 1821(b).

The Court does find, however, that defendants violated section 1821(c). Defendants argue that they disclosed the terms and conditions of plaintiffs' occupancy of their housing on plaintiffs' food stamp forms. The Court rejects this argument for the reasons discussed above. In particular, defendants did not establish that each worker received information concerning the terms and conditions of housing. The Court also finds that defendants did not, alternatively, post a statement of the terms and conditions of housing in a conspicuous place. Testimony at trial

indicated that defendants, at most, may have posted information concerning the use of the showers.

Defendants admit that they violated section 1821(d)(2), which requires them to provide to each worker for each pay period "an itemized written statement" of the information required by section 1821(d)(1). Section 1821(d)(1) requires defendants to make, keep, and preserve records regarding the wage history of each worker. There appear to be two issues concerning defendants attempt to comply with section 1821(d)(1): (1) whether defendants prepared and preserved the appropriate records for each worker; and (2) whether such records contained an accurate statement of the number of hours worked. The Court finds that defendants violated section 1821(d)(1) on both grounds. The evidence demonstrated that defendants

did not keep detailed and accurate records in accordance with this section for each plaintiff. The records defendants did prepare and maintain, moreover, often lacked accurate information concerning the workers' hours. Defendants argue that their wage records adequately reflect the number of hours plaintiffs worked. The Court discussed this issue with respect to plaintiffs' FLSA claims and I will not repeat that discussion here. It is sufficient to note that the Court has found that defendants' records of plaintiffs' hours were not adequate under the FLSA and Anderson, let alone specific enough to meet this section 1821(d)(1)'s requirements. I also find that defendants' violation of section 1821(d) was serious; maintenance of proper records could have prevented much

of the controversy that gave rise to the present action.

The Intentionality Requirement

The next issue the Court must resolve is whether the above violations were intentional. Section 1854(c)(1) of the Act provides as follows:

> (1) If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation under this chapter, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief....

18 U.S.C. (1854(c)(1). Defendants' argument with regard to this section is simple: They could not have intentionally violated the Act because they did not know of the Act's existence or provisions until plaintiffs' attorneys contacted them regarding this action. Plaintiffs respond that section

1854(c)(1) does not require that defendants have had a specific intent to violate the Act's provisions, but rather employs the general civil law standard of intent, under which a person is held responsible for the natural consequences of his or her actions. See Salazar-Calderon v. Presidio Valley Farmers Association, 765 F.2d 1334, 1345 (5th Cir. 1985), petition for cert. filed, 54 U.S.L.W. 3376 (U.S. Nov. 18, 1985) (No. 85-849); see also De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 238 (7th Cir. 1983) (the term intentionally as used in this section "'means conscious or deliberate and does not require a specific intent to violate the law'") (quoting Alvarez v. Joan of Arc, Inc., 658 F.2d 1217, 1224 (7th Cir. 1981).

For two reasons, the Court finds that defendants intentionally violated

the Act's requirements. First, as a matter of law, defendants' alleged lack of actual knowledge of the Act's applicability and requirements does not preclude the Court from finding that an intentional violation occurred. Defendants acknowledge that the civil law standard of intent applies under the Act, but argue that even under this standard "at least an 'awareness' of the existence of the statute" is a prerequisite to liability. Defendants' Post Trial Brief at 42. There is some case law that would appear to support defendants' position. See, e.g., Rivera v. Adams Packing Association, Inc., 707 F.2d 1278, 1283 (11th Cir. 1983) (intentional violation found where defendant was aware of the Act's provisions); Castillo, 704 F.2d at 198 (defendants' testimony established that he was aware of the Act's requirements).

Defendants have not produced any cases, however, holding that a person in their position could not commit an intentional violation of the Act. I believe, moreover, that such a holding would evince an erroneous interpretation of the Act's requirements. See Salazar-Calderon, 765 F.2d at 1345 & n. 5 (court rejected argument that defendant could not have committed an intentional violation of FLCRA, the Act's predecessor, absent knowledge of the Act's existence and requirements); De La Fuente, 713 F.2d at 238 (defendants' erroneous belief that it was exempt from the Act's requirements did not make its violation unintentional). I find that defendants intentionally failed to provide plaintiffs with the information required by section 1821(a) at the time of recruitment; intentionally failed to post or otherwise to provide the terms

and conditions of housing as required by section 1821(c); and intentionally failed to comply with the information and recordkeeping requirements of section 1821(d). Defendants do not argue that they negligently or carelessly failed to take the steps required to comply with these provisions of the Act. Defendants thus intentionally violated the Act's provisions. See Salazar-Calderon, 765 F.2d at 1345 n. 5 (the Act focuses on "the deliberateness of the conduct involved, not the defendant's knowledge of the Act").

I hold as an alternative ground for my decision that the evidence showed that defendants were, or should have been, aware of the Act's existence and possible application to them before the start of the 1983 strawberry harvest. The January 1983 edition of the Great

Lakes Vegetable Growers News, which defendants admit to having received but disclaim having read, carried a fairly lengthy story on the Act and its effect on growers. Ronald Gaskill from the Farm Bureau, testified that the May 1983 edition of Rural Living, another magazine defendants admit to having received but disclaim having read, carried a three paragraph announcement regarding the Act. Although not widely disseminated, information from which defendants did or could have learned of the Act's existence and application to them was available and in circulation during the spring of 1983. Given their lengthy connection with the industry, defendants' claims of having been completely ignorant of the Act's existence and requirements are less than credible. There is sufficient evidence in the record for the Court to conclude

that defendants were aware of the Act's existence and possible application to them in the spring and summer of 1983. I thus find on this ground also that defendants intentionally violated the Act.

Statutory Damages

The final determination the Court must make is how much to compensate plaintiffs for defendants' violations of the Act. Plaintiffs are not claiming any actual damages, but have chosen instead to rely on the Act's statutory damages provision. See Alvarez v. Joan of Arc, Inc., 658 F.2d 1217, 1224 (7th Cir. 1981) (a court can award liquidated damages even absent a showing of actual injury). This provision has a dual purpose. First, it allows plaintiffs to recover for harm they have suffered even when they cannot prove actual injury. Second, it promotes compliance with the

Act's requirements and deters future abuses. Beliz, 765 F.2d at 1332. The Fifth Circuit has summarized the considerations relevant to determining what level of damages would suffice to deter future violations as follows:

> Deterrent effect may be achieved without awarding exemplary damages. Whether an award accomplishes this purpose, in addition to affording compensation, is determined by considering not only the amount allowed to each plaintiff for each violation but also the total amount of the award, the nature and persistence of the violations, the extent of the defendants' culpability, damage awards in similar cases, the defendant's ability to prevent future violations of the Act, the substantive or technical nature of the violations, and the circumstances of each case. Plainly, it ought not to be cheaper to violate the Act and be sued than to comply with the statutory requirements. Nor should a worker who sues for violations find recovery inadequate to cover his personal costs in filing suit, testifying, and paying attendant attorney's fees,

> recovery of which is not allowed by the Act. Further, the legislative history of the Act notes that farm workers who attempt to assert their rights must overcome a general background of fear and intimidation caused by the widespread practice of retaliation against those who complain about violations. Awards should be adequate to encourage workers to assert their statutory rights.

Id. at 1332-33 (citations omitted). A court should also consider "the total number of plaintiffs involved, the total number of violations, and the total amount that will be exacted from the delinquent defendant. Id. at 1333.

In deciding what level of damages to award plaintiffs, the Court considered the following factors: (1) defendants' unexcused failure to comply with most of section 1821's information and recordkeeping requirements; (2) that defendants' failure to have kept accurate time and wage records for each

plaintiff caused plaintiffs to have to file suit to recover wages due them under the FLSA; (3) that defendants may not have knowingly or willfully violated the Act; (4) defendants ability to prevent future violations of the Act; (5) that each of the thirty-seven plaintiffs suffered in some respect from defendants' violations of the Act; (6) that a substantial award may be necessary to deter future violations of the Act's provisions; (7) that defendants were aware before the start of the 1983 strawberry harvest of their obligation to keep accurate records of the hours each plaintiff worked; and (8) the recent nature of the changes in the law that led to defendants' liability. Given these factors, the Court believes that an award of $300.00 per plaintiff, or approximately $75.00 per plaintiff per violation, is adequate

both to compensate plaintiffs for their injuries and to deter future violations of the Act. Although this award is at the low end of the scale, I believe it is appropriate given the "technical" nature of many of the violations; the aggregate amount of the award; and the absence of proof regarding defendants' continuing failure to comply with the Act's requirements.

Attorneys' Fees

One final matter the Court must consider is plaintiffs' entitlement to attorney's fees under the FLSA. The FLSA provides that a court shall, in addition "to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendants, and costs of this action." 29 U.S.C. (216(b). In accordance with this provision, the Court will award plaintiffs the fees and

costs they incurred in connection with their FLSA claims. The Court will employ the following procedure in determining the amount of such fees and costs: (1) within fifteen (15) days from the date of this opinion, plaintiffs' attorneys shall submit a statement to the Court setting forth the number of hours they spent on the FLSA claims upon which plaintiffs prevailed; (2) this statement shall include a detailed listing of the specific activities to which such time was devoted and of plaintiffs' attorneys' expenses; (3) plaintiffs' attorneys shall submit an affidavit verifying that the hours they claim were reasonably necessary to prepare and try the FLSA claims; (4) plaintiffs' attorneys shall also submit affidavits setting forth what they believe to be a reasonable hourly rate for their services, giving

due regard in particular to their competence, prevailing legal rates in the community, and the novelty or difficulty of the issues presented; with regard to the second of these factors, plaintiffs' attorneys shall submit affidavits from three lawyers in the community regarding prevailing hourly rates; (5) defendants will have fifteen (15) days from their receipt of plaintiffs' statement and affidavits to respond to such materials. The Court will then decide on an appropriate award. The parties shall also brief any relevant legal issues regarding plaintiffs' fee application.

DATED in Kalamazoo, MI:

March 27, 1986

RICHARD A. ENSLEN
US District Judge

FOOTNOTES

1. The parties stipulated that there were twenty-seven adult and ten minor plaintiffs. The Court, however, finds that the following twenty-eight persons have presented minimum wage claims: Jesus Bueno, Jose Castro, Juana Castro, Evangelina Castro, Linda Cerna, Andres Cerna, Frances Daughtry, Ernesto Cordova, Martha Cordova, Juanita Cordova, Eli Gonzalez, Jesusita Gonzalez, Consuelo Salinas, Frank Martinez, Rosario Moreno, Rafael Moreno, Raul Jasso, Aracelia Jasso, Ermelando Jasso, Josefina Jasso, Teodoro Jasso, Maria Luisa Jasso, Silvia Jasso, Dora Alicia Jasso, Teodoro Jasso, Jr., Hermelinda Jasso, Reyna Jasso de Herrera, and Santos de Herrera. The confusion evidently arose over the status of Evangelina Castro. Plaintiffs listed Evangelina Castro as a minor in the heading of their complaint, yet stated in paragraph eight of the complaint that Ms. Castro is an adult. Complaint P8. Joseph Castro testified at trial that his daughter was 18 in 1983, and defendants list her in their post-trial brief as having a minimum wage claim. Defendants' Post Trial Brief at 2. The Court therefore considered Evangelina Castro as having a claim under the FLSA.

2. The Court did not consider the MSAWPA claims of those person whom it found did not work for defendants during the 1983 strawberry harvest for purposes of the FLSA. Specifically, as discussed above, the Court has found that plaintiffs did not establish that Francis Daughtry, Aracelia Jasso,

Hermelinda Jasso, Reyna Herrera, or Santos Herrera worked for defendants during the 1983 strawberry harvest. The Court thus did not consider such plaintiffs' claims under either the FLSA or the MSAWPA.

No. 86-1403

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JESUS BUENO; JOSE CASTRO; JUANA CASTRO; EVANGELINA CASTRO; NEIVES CASTRO; and LUCILA CASTRO, minors, by and through their next friend and parents, JOSE AND JUANA CASTRO; et al.,

Plaintiffs-Appellees,

v.

RICHARD & DARLENE MATTNER, d/b/a MATTNER FARMS,

Defendants-Appellants.

ON APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed September 30, 1987.

Before KENNEDY and NELSON, Circuit Judges; and WEBER,* District Judge.

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*The Honorable Herman Jacob Weber, United States District Judge for the Southern District of Ohio, sitting by designation.

KENNEDY, Circuit Judge.

Defendants-appellants Richard and Darlene Mattner, d/b/a Mattner Farms ("defendants") appeal the decision of the District Court finding defendants in violation of both the Migrant and Seasonal Agricultural Worker Protection Act ("the Act" or "the MSAWPA") and the Fair Labor Standards Act ("the FLSA"). The District Court for the Western District of Michigan found that defendants' failure to provide written disclosures constituted an intentional violation of the MSAWPA, 29 U.S.C. {{ 1821(a)(1)-(5), 1821(c), and 1821(d)-(2), and that defendants had failed to pay minimum wages to members of the group of plaintiffs-appellees ("plaintiffs"). Defendants claim on appeal that" 1) a mere recommendation by a former employee does not constitute recruitment for purposes of

the "family business" exemption under 29 U.S.C. (1803(a)(1); 2) they were unaware of the existence of the Act and their lack of knowledge precludes an intentional violation of the Act; and 3) they had not failed to pay minimum wages during the 1983 strawberry harvest. For the reasons stated below, we affirm the Districts Court's decision that defendants do not qualify for the "family business" exemption, that they are liable under the MSAWPA despite their lack of knowledge, and that they did violate the FLSA.

Defendants are Richard and Darlene Mattner, who own and operate a family farming operation in southwestern Michigan under the name of Mattner Farms. Mattner Farms is a multi-crop farming operation that has harvested strawberries for many years. Plaintiffs are a group of thirty-seven migrant farm

workers, including both adults and children. In 1983, plaintiffs were among the approximately one hundred migrant workers employed by Mattner Farms to harvest strawberries. They were paid on a piece-rate basis. After the harvest, plaintiffs sued defendants under the MSAWPA and the FLSA, claiming that defendants had failed to make written disclosures pursuant to the MSAWPA and failed to pay minimum wages pursuant to the FLSA.

The MSAWPA repealed the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. { 2041, et seq. ("the FLCRA"). See 29 C.F.R. {{ 500.3(b). The MSAWPA was adopted January 14, 1983, and became effective April 14, 1983. Interim regulations promulgated by the Department of Labor were published on April 12, 1983, and final rules and regulations were published on August 12,

1983. The substantive content of the earlier act was incorporated into the MSAWPA, but the new Act went beyond the old by imposing many of the notice and disclosure duties that had been required only of farm labor contractors[1] on the agricultural employer. Under the MSAWPA, the agricultural employer is obligated to: 1) disclose in writing at the time of recruitment for employment the terms of employment; 2) post in a conspicuous place a poster to be provided by the Secretary of Labor; 3)

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[1]The FLCRA provided that a farm labor contractor was "any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports...migrant workers (excluding members of his immediate family)...for interstate agricultural employment." 7 U.S.C. (2042(b). The term did not include "any farmer, processor, canner, ginner, packing shed operator, or nurseryman who engages in any such activity for the purpose of supplying migrant workers solely for his own operation...." 7 U.S.C. (2042(b)(2).

post and present to each employee a statement of the terms and conditions of provided housing; 4) keep wage records reflecting hours worked and wages paid; and 5) provide each employee with an itemized written statement of the wage record information at each pay period. See 29 U.S.C. {{ 1821(a)(1)-(5), 1821(b), 1821(c), 1821(d)(1), and 1821(d)(2). A person aggrieved by an intentional violation of the Act is granted a private cause of action and may recover actual or statutory damages. See id. at {{ 1854(c)(1).

As did the FLCRA, the MSAWPA provides an exemption from its coverage for family businesses. Under the Act, the following is not subject to the provisions requiring disclosures by agricultural employers:

> Any individual who engages in a farm labor contracting activity on behalf of a farm,

> processing establishment, seed conditioning establishment, cannery, gin, packing shed, or nursery, which is owned or operated exclusively by such individual or an immediate family member of such individual, if such activities are performed only for such operation and exclusively by such individual or an immediate family member, but without regard to whether such individual has incorporated or otherwise organized for business purposes.

29 U.S.C. § 1803(a)(1) (emphasis added). The regulations specify who will be considered an immediate family member. 29 C.F.R. § 500.20(o). The "immediate family" is limited to spouses, children, stepchildren, foster children, parents, step-parents, foster parents, and siblings.

Plaintiffs asserted at trial that Mattner Farms failed to provide the necessary written disclosures and that defendants' failure constituted an intentional violation of the Act.

Defendants admitted that they had not made many of the disclosures required of them, but claimed that their failure was the result of a lack of knowledge of the existence of the Act and its requirements. They also argued that they fell under the family business exemption of section 1803(a)(1). Plaintiffs additionally claimed that defendants violated the FLSA during the three weeks of strawberry harvest by failing to maintain records of the hours worked and by failing to pay minimum wage. In response to this second complaint, defendants asserted that the piece-rate pay was sufficient to satisfy the minimum wage requirements and that their records were in compliance with the FLSA. Plaintiffs finally asserted a claim for retaliatory discharge, alleging that at least one migrant worker was discharged for complaints

made about the wage rate. Plaintiffs sought monetary damages, injunctive relief, and reasonable attorney's fees with respect to their minimum wage claims.

Regarding plaintiffs' claims under the MSAWPA, the District Court for the Western District of Michigan found that persons other than the Mattners or their immediate family had performed farm labor contracting activities on behalf of Mattner Farms and that defendants therefore fell outside of the family business exemption. The court found that a Mr. Benavides had recruited workers with defendants' knowledge and acquiescence. The court also rejected defendants' claim that they had not intentionally violated the Act. It held that "as a matter of law, defendants' alleged lack of actual knowledge of the Act's applicability and requirements

does not preclude the Court from finding that an intentional violation occurred." Joint Appendix at 114. The court held alternatively, that "the evidence showed that defendants were, or should have been, aware of the Act's existence and possible application to them before the start of the 1983 strawberry harvest." Id. at 115. Finally, the District Court found that defendants had failed to maintain adequate records, and, in the case of several of the plaintiffs, had failed to pay minimum wages. Defendants appeal this decision.[2]

APPLICABILITY OF THE MSAWPA TO DEFENDANTS

Defendants first claim that they fall within the family business

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[2]The District Court also found that no basis existed to support a claim of retaliatory discharge. Plaintiffs do not appeal this holding.

exemption provided by 29 U.S.C. { 1803(a)(1). They assert that since the 1960s they have not authorized, directed, or hired any person to recruit, solicit, or employ migrant workers to work at Mattner Farms. Instead, they hire their workers from those who drive onto their farm looking for work. The District Court made a factual finding, however, that defendants had "implicitly or explicitly authorized Mr. Benavides to bring workers with him to their farm and that Mr. Benavides was at least partially in charge of his 'crew'." Joint Appendix at 106. It concluded that defendants did not qualify for the exemption because non-family members performed farm labor contracting activities for the farm. Defendants must demonstrate that the court's findings were clearly erroneous. See Fed. R. Civ. P. 52.

Several of the plaintiffs had apparently been previously employed by the Mattners. They obtained their employment for the harvest of 1983 by telephone call to the Mattners. Others of the group simply arrived at the farm seeking employment, having heard about the farm from friends. Plaintiffs claim that several of their number were recruited by Mr. Benavides to work at the farm. Mr. Benavides was employed as a field boss by the Mattners for the 1983 season. He apparently contacted Richard Mattner seeking employment as a crew leader, whereupon Mr. Mattner informed him that they did not use crew leaders. The Mattners were losing a field boss, however, and told Mr. Benavides that there might be work as a field foreman, coordinating the camp and assisting in the fields. Defendants claim that they advised him to check

back with them in the spring and that they had no further contact with him. In his testimony and his deposition, Mr. Benavides stated that he had had several telephone conversations with defendants over the course of the spring and that defendants had authorized him to bring enough workers to fill seven houses. In addition, several plaintiffs testified that Mr. Benavides had brought workers with him from Florida and had performed other farm labor contracting activities. Rafael Moreno testified that Mr. Benavides had brought him to the Mattners and Jose Castro stated that Mr. Benavides had brought other families as well. The Cordovas stated that they had driven onto the farm seeking employment, but that Mr. Mattner informed them that he was not hiring. They claimed that as they were leaving, Mr. Benavides gave them work and provided them with

housing. Mr. Benavides' testimony was consistent with that of the Cordovas.

The District Court's finding that Mr. Benavides had performed farm labor contracting activities on behalf of defendants is not clearly erroneous. The court expressly noted the evidence upon which it relied in reaching its conclusions. It accepted the testimony of Mr. Benavides and the other evidence suggesting that he was authorized to recruit workers, and rejected defendants' testimony that they were disassociated from Mr. Benavides' activities. The court found that:

> [d]efendants cannot claim the benefit of the family business exemption, and thus escape liability under the Act, by arguing that they never explicitly authorized others to perform farm labor contracting activities on their behalf when they accepted the benefit of migrant labor brought to their farm through the efforts of other workers. Defendants'

> acceptance of some workers with the knowledge that they were there because of Mr. Benavides' efforts precludes them from claiming the benefit of this exemption.

Id. at 107-08. The United States Supreme Court recently reiterated that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985). The Court further stated that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Id. at 574. The District Court's finding that there was in fact recruitment by someone other than a family member is plausible

in light of the record viewed as a whole and thus not clearly erroneous.[3] Defendants are therefore not exempted from the disclosure requirements of the MSAWPA as a "family business."

THE "INTENTIONAL VIOLATION" STANDARD

The MSAWPA was adopted in January of 1983 and became effective on April 14 of the same year. Defendants admit that they failed to comply with several of the disclosure provisions. They claim, however, that they were unaware of the existence of the Act and that their lack of knowledge precluded a finding by the court that they had committed an

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[3]We note that the District Court also found that "defendants would hire new workers who would arrive with repeat help." Joint Appendix at 108, and that at least one worker had learned about the farm through a former employee. We disagree with the court's holding that these gratuitous recommendations were also farm labor contracting activities performed on defendants' behalf.

intentional violation. Defendants assert that the first time they learned of the Act was when they received a letter from plaintiffs' attorney. They were generally aware of the existence of the earlier FLCRA, but were not familiar with the substance of the statute because they did not employ farm labor contractors.

The District Court found that defendants "were, or should have been, aware of the Act's existence and possible application to them before the start of the 1983 strawberry harvest." Joint Appendix at 115. We hold that this finding is clearly erroneous. The Act did not become effective until April of 1983, one month before the Mattners began hiring for the 1983 strawberry harvest. Final regulations were not published until August, although interim regulations were published in April. A

representative of the Berrien County office of the Michigan Employment Security Commission, Mr. Pavlides, testified that he requested copies of the new Act from the Department of Labor in the summer of 1983. He was informed that copies of the Act were not then available. By September of 1983, the department had received only Spanish editions of the law. Mr. Pavlides also stated that he had received no inquiries from area farmers during the summer of 1983 and that he believed that they were unaware of the Act. There were a few public comments on the Act. In May of 1983, a monthly Farm Bureau publication carried a comment regarding the new Act. Aside from discussing the development of the Act and its regulations, the publication noted that "[the Act] clarifies many of the ambiguous terms that were used in FLCRA and does not

require farm employees to register as labor contractors." Joint Appendix at 154-55. It further noted that the Act "completely exempts family farms and small businesses from any of the provisions in the Act." Id. at 155. In January, April, and August of 1983, radio releases discussing the Act were broadcast. The August release stated in relevant part that "[t]he Act...requires agricultural employers to disclose certain job information before a migrant or seasonal agricultural worker is hired. The Act repealed, however, the requirements for farmers to register with the U.S. Department of Labor as ['crew leaders']." Joint Appendix at 161-62.

Defendants claimed that they did not read or hear any of the above comments on the MSAWPA. There was no evidence presented to rebut this

assertion or to indicate that defendants were aware of the Act and its applicability to them. The District Court simply found that "[a]lthough not widely disseminated, information from which defendants did or could have learned of the Act's existence and application to them was available and in circulation during the spring of 1983." Joint Appendix at 115. It thus concluded that defendants were or should have been aware of the Act. We find that, given the timing of the Act and the scarcity of information regarding the Act, this finding is clearly erroneous.

The District Court held alternatively that "as a matter of law, defendants' alleged lack of actual knowledge of the Act's applicability and requirements does not preclude the Court from finding that an intentional

violation occurred." Joint Appendix at 114. We agree. As Plaintiffs assert, this holding is in accordance with the cases addressing the identical "intentional violation" standard under the FLCRA.[4] The Courts of Appeals for the Seventh and Ninth Circuits have held that "the term 'intentional' in Section 2050a(b) means conscious or deliberate and does not require a specific intent to violate the law." Alvarez v. Joan of Arc, Inc., 658 F.2d 1217, 1224 (7th Cir. 1981); De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 255, 238 (7th Cir. 1983); Alvarez v. Longboy, 697 F.2d 1333, 1338 (9th Cir. 1983) (noting agreement with the interpretation of the Seventh

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[4]The "intentional violation" standard under the MSAWPA has not yet been addressed by an appellate court. However, the legislative history of the Act indicates that the standard is identical to that in the analogous FLCRA provision, section 2050a(b). See 1982 U.S. Code Cong. & Admin. News 4567.

Circuit). The Court of Appeals for the Eleventh Circuit has interpreted the term 'intentional' to refer to "the standard by which a person may be held liable for the natural consequences of his or her acts." Rivera v. Adams Packing Ass'n, 707 F.2d 1278, 1283 (11th Cir. 1983). Finally, the Court of Appeals for the Fifth Circuit has adopted both of the above definitions. See Castillo v. Givens, 704 F.2d 181, 197-98 (5th Cir.), cert. denied, 464 U.S. 850 (1983).

Defendants respond that, although courts have held that there is no requirement of specific intent to violate the law, there must at least be some awareness that the law exists. They claim that a total lack of awareness must preclude a finding of an intentional violation and they note that in most of the cases addressing the

standard the defendants were at least aware of the requirements of the statute. See, e.g., Castillo, 704 F.2d 181; Rivera, 707 F.2d 1278. Defendants stress that the statute does require an intentional violation and that finding an intentional violation in a case such as this one would effectively eliminate the term "intentional" from the provision. We reject defendants' claim and find in accordance with the Court of Appeals for the Fifth Circuit which has rejected the claim that a defendant may not be held liable where the defendant was unaware of the existence or applicability of the statute. In Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334 (5th Cir. 1985), cert. denied, 106 S. Ct. 1245 (1986), the defendants argued that they had no knowledge of the existence of the FLCRA. The court stated in dicta that

that argument was meritless, emphasizing that "[t]he focus under the standard we adopted [in Castillo] is on the deliberateness of the conduct involved, not the defendant's knowledge of the Act." Id. at 1345 n.5.5 It reasoned that the intentional requirement must be construed "so as to further the Act's remedial purposes." 765 F.2d at 1345. See also De La Fuente, 713 F.2d at 238 (stating that the defendant "failed to disclose adequately its intention to obtain compensation from interim employers for housing the Farmworkers, and there are no facts in the record to indicate that this failure was not conscious or deliberate (even if [the defendant was] unaware it was violating the law)"). Even assuming that they had no knowledge of the MSAWPA and its applicability to them, defendants in the case before us "do not argue that they

negligently or carelessly failed to take the steps required to comply with these provisions of the Act." Joint Appendix at 115. We affirm the District Court's conclusion that defendants thus intentionally violated the Act's provisions.

THE FLSA VIOLATION

The Fair Labor Standards Act required that defendants pay plaintiffs a minimum of $3.35 per hour. See 29 U.S.C. { 206. Defendants were obligated to pay the workers at least the equivalent of the minimum wage, even though in the form of a piece-rate wage as opposed to an hourly wage. In addition, the Act obligated defendants to prepare and maintain individual records documenting the hours that each worker worked. See 29 C.F.R. {{ 516.2a(7), 516.6(a)(1). The Mattners

apparently daily noted the time that the first worker entered the field and the time that the last worker left. In addition, the workers themselves were to fill out worksheets noting the number of flats picked and the hours worked. Defendants claim that the District Court erred in finding that they had failed to maintain adequate records and to pay the statutorily mandated minimum wage. We reject defendants' claim.

Plaintiffs were obligated to prove their entitlement to relief by a preponderance of the evidence. Because the defendant is usually in the best position to know the facts in a FLSA case, the Supreme Court has established guidelines for shifting the burden of going forward with the evidence to the employer. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686-88 (1946). The court must first determine

whether the defendants kept adequate records. If the defendants failed to do so the plaintiffs must establish that they performed work for which they were not compensated and the amount and extent of such work. Finally, the defendants must produce other evidence establishing the precise amount of work performed or rebutting the inferences to be drawn from the plaintiffs' evidence.

Regarding the adequacy of defendants' recordkeeping, we see no prohibition in the FLSA against maintaining records of hours worked on a "first in, last out" basis and transferring those hours to individual records. The worker can only benefit under this system. In the case before this Court, however, defendants failed to maintain any individual records and the number of hours actually credited to each plaintiff was based on defendants'

observations, transferred onto worksheets, of when each plaintiff was out of the field. The District Court correctly held that defendants had not maintained adequate records in accordance with the FLSA. The court further held that the plaintiffs who had testified had established generally the hours both they and other plaintiffs had worked. Noting that a plaintiff's testimony can be sufficient to satisfy its burden of proof, the court determined the extent to which plaintiffs had been underpaid on the basis of the testimony and the worksheets presented at trial. The court concluded that "most of the plaintiffs performed work during the 1983 strawberry harvest for which they were not properly compensated," Joint Appendix at 92, and found that defendants had failed to produce other

evidence rebutting this conclusion or indicating the exact hours worked. The court addressed the individual claims and awarded the amounts to which it found plaintiffs entitled. These findings are not clearly erroneous. We therefore affirm the court's awards under the FLSA.

CONCLUSION

We hold that the District Court's finding that defendants do not qualify for the "family business" exemption under 29 U.S.C. (1803(a)(1) because Mr. Benavides performed farm labor contracting activities on their behalf is not clearly erroneous. We affirm the court's finding of liability under the MSAWPA despite defendants' alleged lack of knowledge of the Act and its applicability to them. Finally, we affirm the awards granted as a result of

violations of the FLSA.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 86-1403

JESUS BUENO, et al.,

Plaintiffs-Appellees,

v.

RICHARD and DARLENE MATTNER, d/b/a Mattner Farms,

Defendants-Appellants.

Before: KENNEDY and NELSON, Circuit Judges; and WEBER, District Judge.

J U D G M E N T

ON APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court

that the judgment of the said district court in this case be and the same is hereby affirmed.

IT IS FURTHER ORDERED that Plaintiffs-Appellees recover from Defendants-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk
Issued as Mandate: October 26, 1987
A True Copy.
COSTS: NONE Attest: Deputy Clerk
Filing fee.....$
Printing.....$
Total.....$

No. 87-1111

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

RICHARD and DARLENE MATTNER, d/b/a MATTNER FARMS,

Petitioners,

v.

JESUS BUENO, *et al.*,

Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

MICHIGAN MIGRANT LEGAL ASSISTANCE PROJECT, INC.
Attorneys for Respondents
By: GARY N. GERSHON
49 Monroe Center, N.W., 3-A
Grand Rapids, MI 49503-2933
(616) 454-5055

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED

MUST DEFENDANTS BE AWARE OF THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSAWPA) TO BE LIABLE FOR DAMAGES FOR VIOLATION OF THE ACT?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
REASONS WHY THE WRIT SHOULD BE DENIED	3
Summary of Argument	3
Considerations For Granting Certiorari Under Rule 17.1 Have Not Been Presented	4
MSAWPA—History And Purpose, Particularly Regarding Private Enforcement As A Means To Remedy Abuses And Broad Construction Thereof	4
There Is No Conflict Among The Circuits With Regard To The Only Issue Before The Court Nor Are There Conflicts With Decisions Of This Court And Petitioners' Argument Is Without Merit	6
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Abrams v. United States, 250 U.S. 616 (1919) 9

Almendarez v. Barrett-Fisher Co., 762 F.2d 1275 (5th Cir. 1985) 5

Alvarez v. Joan of Arc, Inc., 658 F.2d 1217 (7th Cir. 1981) 6, 9

Alvarez v. Longboy, 697 F.2d 1333 (9th Cir. 1981) 6

Aranda v. Pena, 413 F. Supp. 849 (S.D. Fla. 1976) 7

Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317 (5th Cir. 1985) 2, 5

Bueno v. Mattner, 633 F. Supp. 1446 (W.D. Mich. 1986) 1

Bueno v. Mattner, 829 F.2d 1380 (6th Cir. 1987) 1, 2, 8, 10

Castillo v. Givens, 704 F.2d 181 (5th Cir. 1983), *cert. denied* 464 U.S. 850 (1984) 3, 6, 9

Cramer v. United States, 325 U.S. 1 (1944) 9

De La Fuente v. Stokely-Van Camp, 713 F.2d 225 (7th Cir. 1983) 6, 8

De Leon v. Ramirez, 465 F. Supp. 698 (S.D.N.Y. 1979) 7, 9

Ellis v. United States, 206 U.S. 246 (1907) 8

Marshall v. Coastal Growers Ass'n, 598 F.2d 521 (9th Cir. 1979) 5

Mountain Brook Orchards v. Marshall, 640 F.2d 454 (3d Cir. 1981) 5

NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) 9

Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979) 9

TABLE OF AUTHORITIES—Continued

Page

Radio Officers Union v. Labor Board, 347 U.S. 17 (1953) 9

Reynolds v. United States, 98 U.S. 145 (1879) 8

Rivera v. Adams Packing Ass'n Inc., 707 F.2d 1278 (11th Cir. 1983) 7

Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334 (5th Cir. 1985), *cert. denied* — U.S. —, 106 S. Ct. 1245 (1986) 3, 5, 6, 8

Sandstrom v. Montana, 442 U.S. 510 (1979) 9

Soliz v. Plunkett, 615 F.2d 272 (5th Cir. 1980) 5

Stewart v. James, 519 F. Supp. 315 (E.D.N.Y. 1981) 7

Washington v. Miller, 721 F.2d 797 (11th Cir. 1983) 7, 9

STATUTES

Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* 2

Farm Labor Contractor Registration Act, 7 U.S.C. § 2041, *et seq.* 4

Migrant and Seasonal Agricultural Worker Protection Act,

29 U.S.C. § 1801 *et seq.* ..... *passim*

29 U.S.C. § 1854(c)(1) 3, 5

COURT RULE

Supreme Court Rule 17 4

MISCELLANEOUS

H.R. Rep. 97-885, 97th Cong. *reprinted in* 1982 U.S. Code Cong. & Ad. News 5

S. Report No. 93-1295, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6441 5

128 Cong. Record 10456 (1982) 6

In The

Supreme Court of the United States

DARLENE and RICHARD MATTNER, d/b/a MATTNER FARMS,

Petitioners,

v.

JESUS BUENO, *et al.*,

Respondents.

No. 87-1111

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

Respondents, 32 migrant farmworkers awarded damages for petitioners' violations of the Migrant and Seasonal Agricultural Worker Protection Act (hereinafter "MSAWPA" or the "Act"), respectfully request that this Court deny the petition for certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, *Bueno v. Mattner*, 829 F.2d 1380 (6th Cir. 1987) affirming *Bueno v. Mattner*, 633 F. Supp. 1446 (W.D. Mich. 1986).

STATEMENT OF THE CASE

Petitioners' recitation is essentially correct.[1] For completeness, however, the following additional details are warranted.

Respondents are 32 of 37 original plaintiffs. The other five are unaffected as they were not awarded damages.

[1]One exception is that the case was commenced in February 1984 rather than 1983. Petition at 7.

The district court ordered injunctive relief and awarded damages under both the Fair Labor Standards Act (hereinafter "FLSA"), 29 U.S.C. § 201 *et seq.* and MSAWPA, 29 U.S.C. § 1801 *et seq.* The total award for both was $10,823.56.

The district court found the petitioners responsible for the following MSAWPA violations (many of which were admitted by petitioners):

1. Failure to disclose place of employment.
2. Failure to disclose wage rate to be paid.
3. Failure to disclose crops and kinds of activities in which worker would be employed.
4. Failure to disclose the period of employment.
5. Failure to provide an itemized written pay statement (containing the basis on which wages are paid; number of piecework units; number of hours worked; total pay period earnings; and net pay); these are to be preserved for three years. These violations are very similar to petitioners' violations of FLSA.
6. Failure to provide information regarding housing provided.

In assessing damages for the MSAWPA violations, the court exercised its discretion, applied the criteria found in *Belis v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985), and awarded only $75.00 per violation although the statute provides for up to $500.00.

Following directly relevant caselaw, the Sixth Circuit rejected the concept that a lack of awareness of the statute must preclude awarding damages for a violation. *Bueno*, 829 F.2d at 1386. The Sixth Circuit concluded that the Fifth Circuit was correct to reject just such a claim in

Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334, 1345 (5th Cir. 1985), *cert. denied*, — U.S. —, 106 S. Ct. 1245 (1986) which relied, *inter alia*, upon *Castillo v. Givens*, 704 F.2d 181, 198 (5th Cir. 1983), *cert. denied*, 464 U.S. 850 (1984).[2]

A number of issues (family business exemption, meaning of "recruitment", etc.) were decided by one or both of the lower courts. The only question for which certiorari is sought is whether a defendant must be aware of the statute in order to be held to pay monetary damages.

REASONS WHY THE WRIT SHOULD BE DENIED

Summary of Argument

Petitioners argue that in order to be held liable for damages to an injured migrant farmworker under MSAWPA § 504(c)(1), 29 U.S.C. § 1854(c)(1), a defendant must know of the Act. Not only is this inconsistent with the remedial purposes and broad construction of the statute and its predecessor but it would be a departure from established law which focuses upon *conduct* not knowledge of illegality. It would also place a premium on ignorance.

Petitioners' position is contrary to all precedents interpreting MSAWPA and the Farm Labor Contractor Registration Act (hereinafter "FLCRA"). In urging this

[2]While not *per se* precedential, it is noteworthy that in both *Salazar-Calderon* and *Castillo*, petitioners requested that this Court review the question of "intentional" violations. *See* Petitions and Briefs in Opposition in Supreme Court No.'s 85-849 and 83-135.

Court to exempt agricultural employers who remain ignorant of their obligations from the private enforcement provisions of the Act, petitioners ask the Court to create an expansive exception permitting evasion of the responsibilities placed upon such employers by Congress in an effort to ameliorate the widespread, persistent and well-documented abuses of impoverished migrant farmworkers.

For there to be a direct and real conflict, there would have to be a case which holds that knowledge of FLCRA or MSAWPA is necessary to award damages. There simply is no such case; nor is there conflict with any decision of this Court or common law.

Considerations For Granting Certiorari Under Rule 17.1 Have Not Been Presented

Petitioners assert (1) that this case conflicts with decisions of this Court and (2) that there is a conflict among circuits. Petition at 14 and 23. These allegedly implicate Supreme Court Rule 17.1(a) regarding conflict between federal courts of appeal and 17.1(c) on decisions which conflict with applicable decisions of this Court. Only by exercise of semantic wizardry can petitioners create these "conflicts". This is not a case of inconsistent decision with this Court or conflict among the circuits: the various decisions are entirely consistent.

MSAWPA—History And Purpose, Particularly Regarding Private Enforcement As A Means To Remedy Abuses, And Broad Construction Thereof

MSAWPA is the successor to the FLCRA. The FLCRA, 7 U.S.C. § 2041 *et seq.*, of 1963 was the first extensive effort by Congress to deal with the documented

abuses and exploitation of migrant farmworkers. The statute was found wanting and was amended in 1974. *See* S. Rep. No. 93-1295, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6441. One glaring defect was lack of effective enforcement. *Id.* at 6443 and 6445.[3] Thus, a private right of action was created. *Id.* at 6450.

By the early 1980's, the statute was still found wanting. MSAWPA was a consequence of "dissatisfaction with . . . [t]he failure of the current law to achieve its goal of fairness and equity for migrant workers . . .". H.R. Rep. No. 97-885, 97th Cong., *reprinted in* 1982 U.S. Code Cong. & Ad. News 4547. Congress was aware of the existing caselaw. *Id.* at 4548.

Congress said of "intentional" in § 504(c), 29 U.S.C. § 1854(c)(1), that it is "a standard identical to that utilized in FLCRA". 1982 U.S. Code Cong. & Ad. News at 4567.

The Act is remedial and to be given broad construction to effectuate its purposes. *See, e.g., Soliz v. Plunkett*, 615 F.2d 272, 275-76 (5th Cir. 1980); *Marshall v. Coastal Growers Ass'n*, 598 F.2d 521, 525 (9th Cir. 1979); *Salazar-Calderon v. Presidio Valley Farmers Ass'n, supra; Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1281 (5th Cir. 1985); *Rivera v. Adams Packing Ass'n. Inc.*, 707 F.2d 1278, 1281 (11th Cir. 1983).

In *Beliz v. W.M. McLeod & Sons Packing Co., supra*, at 1332, the court wrote:

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[3]*Cf., e.g., Mountain Brook Orchards v. Marshall*, 640 F.2d 454 (3d Cir. 1981).

> The legislative history of the Act and the decisions interpreting it make clear that the purpose of this civil remedy is not restricted to compensation of individual plaintiffs. It is designed also to promote enforcement of the Act and thereby deter and correct the exploitive practices that have historically plagued the migrant farm labor market. (footnote omitted).[4]

There Is No Conflict Among The Circuits With Regard To The Only Issue Before The Court Nor Are There Conflicts With Decisions Of This Court And Petitioners' Argument Is Without Merit

To postulate any conflict(s), one must assume that "liability for natural consequences of his or her actions" is somehow substantively different from a "conscious and deliberate act" leading to liability. This semantic distinction is not founded in law but created by petitioners of whole cloth to assert a conflict which no court to date has recognized. *See Salazar-Calderon, supra; Castillo, supra; Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1224 (7th Cir. 1981); *De La Fuente v. Stokely-Van Camp*, 713 F.2d 225 (7th Cir. 1983); *Alvarez v. Longboy*, 697 F.2d 1333 (9th

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[4]See Comments of Congressman Ford at 128 Cong. Record 10456 (December 20, 1982): "[MSAWPA] corrects the key weakness of the FLCRA, which held only the farm labor contractor responsible for such abuses and shielded the employer unless he fell within the narrow definition of farm labor contractor under that Act. . . . Like the FLCRA, the AWPA provides for a private right of action and holds out the prospect of large damage awards against agricultural employers who mistreat their workers. This, I am sure, will prove to be the most important deterrent against the continued abuse of migrant and seasonal farmworkers . . .".

Cir. 1981); *Rivera v. Adams Packing Ass'n Inc., supra; Washington v. Miller,* 721 F.2d 797, 803 (11th Cir. 1983); and, also, *Aranda v. Pena,* 413 F. Supp. 849 (S.D. Fla. 1976); *DeLeon v. Ramirez,* 465 F. Supp. 698 (S.D.N.Y. 1979); *Stewart v. James,* 519 F. Supp. 315 (E.D.N.Y. 1981).

Three points may be drawn from the caselaw: (1) no specific intent to violate the statute is required; (2) there must be conscious or deliberate acts; and (3) a person will be held liable for the natural consequences of his or her acts. The last two are not mutually exclusive; such exclusity is a necessary precursor to accepting petitioners' argument. This threefold approach is effectively the common civil standard of intent as applied to MSAWPA.

The inherent fallacy in petitioners' argument is the focus on *knowledge of the statute* rather than the individual's *conduct.* This is the ultimate illogic of petitioners' position.

In this case, petitioners recruited, hired, housed and paid wages to migrant farmworkers. However, they failed to keep accurate or complete time or pay records and failed to give adequate disclosures. These actions did not have to be undertaken with specific intent to violate the statute. They were conscious and deliberate. The consequences, *inter alia,* were confusion of the farmworkers and failure of petitioners to pay minimum wages or properly record or explain the payments made. These are examples of the abuses or exploitation that Congress has sought to eliminate. The commissions and omissions (*see* Petition at 19) of petitioners violated the Act. They were liable for damages because of what they did and did not do irrespective of knowledge of the Act. It was petitioners' conduct which

created liability. *Cf., e.g., Reynolds v. United States,* 98 U.S. 145, 167 (1879) and *Ellis v. United States,* 206 U.S. 246, 257 (1907).[5]

While the decision of this exact question was perhaps not necessary to the particular facts in that case, the decision in *Salazar-Calderon, supra,* cannot be dismissed so handily as petitioners imply for it carefully scrutinized the major cases as well as legislative history and purpose. The Fifth Circuit concluded that to accept the same argument made in the present case by petitioners would be to change the standard of intent to specific intent. "The focus under the standard . . . is on the deliberateness of the conduct, not the defendant's knowledge of the Act". *Id.* at 1345, n.5, quoted with approval in *Bueno,* 829 F.2d at 1386.[6] Moreover, this standard was determined to further the Act's remedial purposes. So to say that the Sixth Circuit's decision, relying upon *Salazar-Calderon, supra, Castillo, supra,* and *De La Fuente, supra,*

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[5]*Ellis* was a criminal case on the 8 hour day. Justice Holmes wrote: "The argument against the [jury] instruction is that the word intentionally in the statute requires specific knowledge of the law; or at least that, to be convicted, Ellis must not have supposed, even mistakenly, that there was an emergency extraordinary enough to justify his conduct. The latter proposition is only the former a little disguised. Both are without foundation. If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent". 206 U.S. at 257.

[6]The Sixth Circuit there also approvingly quotes from *De La Fuente v. Stokely-Van Camp, supra,* at 238: " . . . there are no facts in the record to indicate that this failure was not conscious or deliberate (even if [the defendant was] unaware it was violating the law)".

was "frolic and detour" and "without cogent analysis" (Petition at 20 and 25) is incorrect. The assertion of conflict between the Seventh and Eleventh Circuits, for instance, is disingenuous. *See Washington v. Miller, supra,* at 803, relying upon *Alvarez v. Joan of Arc, Inc., supra,* from the Seventh Circuit; likewise, the Fifth Circuit in *Castillo, supra,* at 198, utilized both *Joan of Arc, Inc.* and *DeLeon v. Ramirez, supra,* (from the Southern District of New York). The Sixth Circuit's decision was entirely consistent with decisions of other circuits and even the district courts.

Petitioners' assertion of conflict between the Sixth Circuit's decision and precedents of this Court is also disingenuous. The cases cited are inapposite.[7] They do not support the statement that the Court has defined intentional "in construing statutes of *different but similar* social character and legislative purpose to FLCRA and MSAWPA" (emphasis added) as the definition urged by petitioners. Petition at 18.

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[7]Petitioners' reading of Justice Holmes' dissent in *Abrams v. United States,* 250 U.S. 616, 626 (1919) is strained; moreover, *Abrams* was a criminal case (espionage) in the unique context of free speech. *Sandstrom v. Montana,* 442 U.S. 510 (1979) involved a homicide and due process. *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256 (1979) relates to *legislative intent* vis a vis consequences in passing a veterans preference statute. *Radio Officers Union v. Labor Board,* 347 U.S. 17, 45 (1953) involved unfair labor practices and refers to "natural consequences". *Cramer v. United States,* 325 U.S. 1 (1944) was criminal (treason). *NLRB v. Erie Resistor Corp.,* 373 U.S. 221 (1963) is an unfair labor case and is specific to that context, at 227: "cases in this Court dealing with unfair labor practices have recognized the relevance and importance of showing the employer's intent or motive to discriminate or interfere with union rights". There are no equivalent cases in this Court in the present context.

Petitioners have engaged in hyperbole when they say that litigants and lower courts "urgently need" the Court's assistance as "the need for guidance . . . is acute". Petition at 28-9. Further, it is a misstatement that leaving *Bueno v. Matter,* 829 F.2d 1380 untouched "will effectively *re*structure and *re*draft the statutory basis for a private cause of action under MSAWPA and similar legislation, and . . . will *re*define the common law measure of intentional conduct . . .". (Emphases added). Petition at 21-2. This is precisely backwards. All previous cases are consistent. It is petitioners who continue to seek *re*definition. The decision below is sound as it is founded upon the statute, its remedial purposes, all prior caselaw and proper application of common law.

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CONCLUSION

No conflict exists among the circuits or with decisions of this Court or any other. Petitioners' argument is a departure from established law: that a person is liable for the consequences of his or her conduct. Petitioners would condition that liability on awareness of a statutory proscription. Not only would this deviate from established law but it would be inconsistent with the remedial purposes of the statute and be contrary to Congress' efforts to strengthen enforcement by amending FLCRA and then passing MSAWPA.

The Petition for the Writ of Certiorari should be denied.

DATED: January 20, 1988

Respectfully submitted,

MICHIGAN MIGRANT LEGAL ASSISTANCE PROJECT, INC.
Attorneys for Respondents
By: GARY N. GERSHON
49 Monroe Center, N.W., 3-A
Grand Rapids, MI 49503-2933
(616) 454-5055

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

RICHARD & DARLENE MATTNER,
d/b/a MATTNER FARMS,

Petitioners,

vs

JESUS BUENO, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

* * * * * * *

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

* * * * * * *

Richard M. VanOrden
Attorney for Petitioners
Business Address:
Ste. 4000 Campau Square Bldg.
180 Monroe NW
Grand Rapids, Michigan 49503
Phone: (616) 776-0278

Date: January 26, 1988

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TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
Reply to Respondents' Arguments...	1
ASCERTAINMENT OF STATUTORY INTENT: WHETHER THE DECISION OF THE SIXTH CIRCUIT COMPORTS THEREWITH JUSTIFIES GRANT OF CERTIORARI...	4
Conclusion.....	15

TABLE OF AUTHORITIES

	Page
Alvarez v Joan of Arc, Inc., 658 F2d 1217, 1224 (7th Cir 1981)	7, 8
American Federal of Musicians v Wiltstein, 379 US 171, 175 (1964)	14
Armour Packing Co v United States, 209 US 56, 65 (1907)	12
Bueno v Mattner, 829 F2d 1380, 1385 n. 4 (6th Cir 1987)	14
Cramer v United States, 325 US 1, 31 (1944)	7, 11
DeLeon v Ramirez, 465 F Supp 698, 705 (SDNY 1979)	7
Salazar-Calderon v Presidio Valley Farmers Association, 765 F2d 1334, 1345 n.5 (5th Cir 1985)	9, 14
Smith v Wade, 461 US 30, 54 (1982)	6
Steelworkers v Usery, 429 US 305 (1976)	15
United States v Donovan, 429 US 413, 422 (1976)	14
United States v Ruzicka, 329 US 287, 288 (1946)	15

STATUTES

Farm Labor Contractor Registration Act, USC §1873.....4, 6, 7

Migrant and Seasonal Worker Protection Act, USC §1801, et seq. 2, 3, 4, 6, 7, 11, 13, 14

29 USC §1831(a)(1)..... 11

29 USC §1851(a)..... 5

29 USC §1853(a)(1)..... 5

29 USC 1854(c)(1)..... 5

29 USC §1873..... 4

29 USC §1874..... 4

1982 U.S. Code Cong. & Admin. News 4567..... 6

88 Stat. 1657, Dec. 7, 1974..... 6

MISCELLANEOUS

Webster's 3rd New International Dictionary..... 8

No. 87-1111

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

RICHARD MATTNER and DARLENE MATTNER
d/b/a MATTNER FARMS,

Petitioners,

vs.

JESUS BUENO, et al.,

Respondents.

On a petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

Petitioners seek review of the Sixth Circuit's determination that their failure to comply with the

provisions of the Migrant and Seasonal Agricultural Worker Protection Act, 29 USC §1801, et seq., (hereafter MSAWPA or the Act), despite their lack of knowledge even of the existence of the Act, constitutes an "intentional" violation of the Act giving rise to a private cause of action. Petitioners urged that (a) the Sixth Circuit has defined an intentional violation in contradiction to the definitional standard established by this Court, and (b) that the definition applied by the Sixth Circuit conflicts with the definitional standard applied by other Circuits.

Respondents' argument is more nearly directed toward the merits of the issues rather than to the appropriateness of certiorari. Respondents assert that review is inappropriate and unnecessary because Congress enacted

the MSAWPA private cause of action primarily as a means of promoting enforcement of the remedial purpose of the Act. Respondents argue that to condition "liability on awareness of a statutory proscription ... would be inconsistent with the remedial purpose of the statute and be contrary to Congress' efforts to strengthen enforcement..."[1] And since no case exists "which holds that knowledge of ... MSAWPA is necessary to award damages...," Respondents assert, there can be no "... conflict with any decision of this Court or common law."[2] Moreover, say Respondents, the Sixth Circuit's definition of intentional comports with the judicial definitions

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[1]Respondents' Brief in Opposition, page 11.

[2]Respondents' Brief in Opposition, page 4.

given "intentional" conduct under the Farm Labor Contractor Registration Act (FLCRA), the definitional standard intended by Congress to be applicable under MSAWPA.[3]

It is to address this new and further argument raised by Respondents' brief that Petitioners file this brief in reply.

ASCERTAINMENT OF STATUTORY INTENT: WHETHER THE DECISION OF THE SIXTH CIRCUIT COMPORTS THEREWITH ONLY JUSTIFIES GRANT OF CERTIORARI.

MSAWPA was enacted into law in January of 1983.[4] While the Act repealed the former Farm Labor Contractor Registration Act of 1963,[5] it substantially reenacted the provisions

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[3]Respondents' Brief in Opposition, pages 5, 7.

[4]29 USC §1874.

[5]29 USC §1873.

of the prior statute and imposed for the first time on agricultural employers the many disclosure duties previously demanded only of the farm labor contractor.

To enforce the Act, Congress created a three tier structure: (1) criminal sanctions for one "wilfully and knowingly" in violation of the Act;[6] (2) administrative sanctions in the case of "a violation" (strict liability) of the Act;[7] and, (3) a private right of action for "any person aggrieved" by one who "intentionally" violates the Act[8]. Three distinct manner of violations were recognized and separately treated by Congress: the wilful violation, the

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[6] 29 USC §1851(a)

[7] 29 USC §1853(a)(1)

[8] 29 USC 1854(c)(1)

intentional violation, and the mere violation.[9]

The term "intentional" is not defined within MSAWPA, but legislative history indicates that Congress intended continuity of the analogous FLCRA grant of a private cause of action for intentional violations.[10] As originally enacted in 1963, FLCRA made no provision for civil enforcement and it was not until 1974 that Congress amended FLCRA to permit a private cause of action for intentional violations.[11]

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[9]This Court recognized in Smith v Wade, 461 US 30, 54 (1982) that Congress might choose to punish intentional violations of the rights of others but forego imposition of liability for a lesser degree of fault.

[10]1982 U.S. Code Cong. & Admin. News 4567

[11]88 Stat. 1657, Dec 7, 1974.

In 1974, when Congress introduced a private remedy for intentional violations of FLCRA, it may be presumed that Congress knew of the common law measure of "intentional" conduct, as described for instance in Cramer v United States, 325 US 1, 31 (1944), to-wit:

> "...every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts."

By late 1982, when Congress was contemplating the enactment of MSAWPA, two cases existed that analyzed the "intentional conduct" required of FLCRA.[12] The case, DeLeon v Ramirez, 465 F Supp at 705, concluded that:

> "intentionally refers to the common civil standard which holds a person liable for the natural consequences of his or

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[12] DeLeon v Ramirez, 465 F Supp 698 (SDNY 1979); Alvarez v Joan of Arc, Inc., 658 F2d 1217 (7th Cir 1981).

> her acts. The courts have adopted this interpretation in stressing the remedial purposes of the Act;"

and the other case, Alvarez v Joan of Arc, Inc., 658 F2d at 1224, defined intentional to mean "conscious or deliberate." In the factual context of each case, the violator knew of the statute and that it governed his conduct.

If we ascribe to Congress a knowledge of these two decisions, we can also presume that Congress also knew that Webster defines "conscious" as a condition of "knowing" and "perceiving" or "apprehending" - a "controlled thought"; and that Webster defines the word "deliberate" as "to ponder" or "to think about with measured careful consideration."[13] It defies logic and

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[13]Webster's 3rd New International Dictionary

common sense that the Fifth Circuit would suggest, in footnote dicta, that an intentional violation of a statutory duty could occur even in the absence of knowledge of the very existence of the Act,[14] and that two years later the Sixth Circuit, in the instant proceedings, would stretch this dicta beyond its point of elasticity and equate any conduct with deliberate and conscious conduct.

Congress did not intend such an equation. It provided an administrative remedy for any violation and restricted a private cause of action to those aggrieved by an intentional violation. Had Congress intended the private cause of action for any violation of the Act-

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[14] Salazar-Calderon v Presidio Valley Farmers Association, 765 F2d 1334, 1345 n.5 (5th Cir 1985).

i.e., strict liability - it could have and would have said so.

The decision of the Sixth Circuit blurs the segregation of violations made by the Congress and for all practical purposes makes any violation an intentional violation. When, Petitioners ask, might a violation through an omission ever be an unintentional act, if a failure to act from lack of any knowledge of the very existence of the statute is an intentional failure. One need only to face the countryside to hear the howls of scorn and ridicule that will arise when farmers are told that if they fail to comply with the provisions of a statute they did not know to exist, they have intentionally violated the statute. And

one can easily understand why agricultural employers will be of like mind with Mr. Bumble.[15]

Petitioners contend that when their conduct is measured against the common law definition of "intentional" supplied by the Court in Cramer v US, infra at 7, then, rephrased, the question is whether Petitioners, standing without knowledge of the existence of MSAWPA, could reasonably have expected that their failure, at time of recruitment or hire, to disclose in writing the place of employment, the wage rates to be paid, the period of employment, etc;[16] might result in intentional statutory violations. Merely to ask the question, Petitioners contend, is to answer it.

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[15] "If the law supposes that" said Mr. Bumble, "... the law is a ass, a idiot." Oliver Twist, Chapter 51.

[16] 29 USC 1831(a)(1)

And such an answer does not put a premium on ignorance, for a real difference exists between knowledge of the existence of an applicable statute and knowledge of its content and meaning. Lack of knowledge, or mistaken knowledge of content and meaning, has never excused a finding of intentional behavior under the common law. In Armour Packing Co v United States, 209 US 56, 65 (1907) this Court recognized that it is only when "intent is not essential, [that] a mistake or ignorance of fact is quite as immaterial as mistake or ignorance of law."

Petitioners contend that it was the obvious purpose of Congress to create a private cause of action limited to those aggrieved by a farmer who, with the knowledge that the statute existed, failed either to learn of the duties it imposed or, if with knowledge, to comply

with those duties. The Sixth Circuit, however, has ordained that any non-compliance with the statute, even in the case where the non-compliance has its genesis in an unawareness of the statute's existence, gives rise to a private cause of action. This dispute over statutory construction, Petitioners submit, warrants the issuance of certiorari rather than supports its denial.

The MSAWPA is a major act of Congress comprehensively governing and directing activities in the labor marketplace between agricultural producers and the migrant labor force that provides so much of the manpower to raise and harvest the nation's vegetables and fruits. The question of what constitutes an intentional violation

under MSAWPA is one of first impression.[17] Certiorari is appropriate in such instances.[18]

So far as Petitioners can with diligence ascertain, no other case[19] involving an intentional violation of a statutory duty, where the term "intentional" is to be measured by common law, has ever been so bold as to suggest that an intentional violation of statutory duty does not require awareness that, in the least, the statute exists. Thus, whether in all remedial legislation proscribing liability for intentional violations of statutory duty, the definitional ramifications given the

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[17] Bueno v Mattner, 829 F2d 1380, 1385 n.4 (6th Cir 1987).

[18] American Federation of Musicians v Wiltstein, 379 US 171, 175 (19); United States v Donovan, 429 US 413, 422 (19).

[19] Except, of course, Salazar-Calderon, infra at 8.

word intentional by the Sixth Circuit will be applied is, Petitioners urge, a matter of major statutory construction with widespread importance and significance. And this fact also speaks for issuance of a writ to review.[20]

CONCLUSION

For the reasons set forth above, Petitioners submit that Respondents' efforts to deny the propriety of appellate review on the basis that the issue is one simply of statutory construction over which there can be no controversy regarding the criteria and outcome, enlarges rather than denies the

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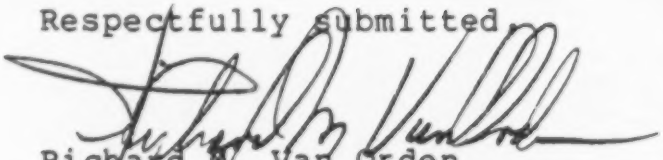
[20] United States v Ruzicka, 329 US 287 (1946); Steelworkers v Usery, 429 US 305 (1976).

need for certiorari and only serves to warrant its grant.

Respectfully submitted,



Richard M. Van Orden
Attorney for Petitioners

BUSINESS ADDRESS:
4000 Campau Sq. Bldg.
180 Monroe Ave., NW
Grand Rapids, MI 49503
Telephone: (616) 776-0278